(1)

Supreme Court, U.S.
FILED

Docket No. 951539 JAN 22 1996

OFFICE OF THE CLERK

IN THE
SUPREME COURT
OF THE
UNITED STATES OF AMERICA
October Term, 1995

J. PATRICK KITTLER
and LINDA ALT KITTLER,

Petitioners

v.

ECKBERG, LAMMERS, BRIGGS,
WOLFF & VIERLING;
KEVIN K. SHOEBERG, ESQ.;
and JON PEDERSON, individually,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

HVASS, WEISMAN & KING CHARTERED
Richard A. Williams, Jr. (#117559)
100 South Fifth Street, Suite 450
Minneapolis, MN 55402
(612) 333-0201
Counsel of Record for the Petitioners

133 pp

QUESTIONS PRESENTED:

Is it a denial of Fourteenth Amendment due process for a state to deny access to its courts for the trial of claims arising from the loss of property, freedom of association and loss of employment opportunity as the result of granting attorneys immunity from suit for the use of untruthful statements in an attorneys' letter soliciting clients and retainer fees for litigation?

May a state court grant a substantial benefit to attorneys and their clients as a class by adopting a rule which denies all others the only judicial remedy available to protect the value of their property, employment and commercial associations from per se defamatory statements maliciously made as part of a solicitation of clients for possible litigation?

TABLE OF CONTENTS

Questions Presented i

Table of Authorities. v

Citation of Official
and Unofficial Reports xi

Statement of Basis for Jurisdiction :
Dates. xi
Statutory. xi
Legal Precedent. 12-14

Constitutional Provisions and Statutes . xii

Statement of the Case 1

Reasons for Granting the Petition:

The questions presented are matters of first impression in the United States Supreme Court which affect citizens in every jurisdiction in which lawyers solicit clients. 11

The relevant facts are simple and uncontested 15

The Minnesota Court of Appeals decision conflicts with U. S. Supreme Court, on two controlling issues 18, 19

The Minnesota Court of Appeals decision conflicts with several Circuit Courts on the question of the status of an attorney when soliciting clients. 14, 16

The Minnesota Court of Appeals decision conflicts with several Circuit Courts on the question of judicial sponsorship of solicitation. 16

The Court of Appeals decision is in conflict with the Courts of the states Arizona, California, Michigan and New York on the issue of denial of a forum in the circumstances presented here. 17

Conclusion. 20

APPENDIX

Supreme Court ORDER Denying Reconsideration 1

Supreme Court ORDER Denying Petition for Review of the Decision of the Minnesota Court of Appeals 2

Court of Appeals Opinion & Award . 3-13
Letter of Solicitation of 2/26/93 14-16
Proposed Retainer Agreement 17-19

Trial Court's Findings of Facts, Conclusions of Law, and Order and Memorandum (2nd Motion) 20-34

Trial Court's Findings of Facts, Conclusions of Law, and Order and Memorandum (1st Motion) 35-44

Petition for Reconsideration of Order Denying Petition for Review of the Decision of the Court of Appeals . . 45-48

Petition for Review of the Decision of the Minnesota Court of Appeals 49-59

Excerpts from Petitioners' Brief, In Court of Appeals 60-74

Excerpts from Petitioners' Reply Brief 75-80

Excerpts From Petitioners' Memorandum in Opposition to Renewed Motion For Summary Judgement 81-83

Excerpts From Petitioners Memorandum in Opposition to Respondents' Motion For Summary Judgement 84-103

Petitioners' Memorandum In Support of Motion For A Continuance and to Compel 104-106

TABLE OF AUTHORITIES
CASES

Bates v. State Bar of Arizona,
433 U.S. 350 (1977) 7,8,9,10

Brooks v Doherty, Rumble & Butler,
481 N.W.2d 120, 125 (Minn. 1992) 3

Dolan & Lee v Project Const. Corp,.
725 F2d 1263, 1268 (CA 10 1984) . . . 16

Gibbs v. Zimmerman, et.al., 290
U.S. 326 (1933) 13,14

Gold v. Intersoft Corp, 128 Misc.2d 198
489 N.Y.S. 2d 660 (1985), order aff'd 491
N.Y.S. 2d (1985). 17

Green Acres Trust v London, 141 Ariz.
609 , 688 P.2d 617 (Ariz. 1984). 17

In re Primus, 436 U.S. 412, (1978). . . . 16

In re R.M.J., 455 U.S. 191 (1982). 8

Kinney Shoe Corp. v Vorhes,
564 F2d 859 (CA 9 1977) 16

Laffer v Levinson, 34 Cal. 4th 117, 40
Cal. Rptr. 2nd 233 (1995), Cert. denied
July 20, 1995. 13

Lemon v. Kurtzman, 411 U.S. 192 . . . 13

Lewis v. Equitable Life Assurance Society of the United States, 389 N.W. 2d 876 (Minn. 1986) 2,6

Matthis v. Kennedy, 243 Minn 219 , 67 N.W. 2d 413 (Minn. 1954). 10

McDevitt v. Tilson, 453 N.W.2d 53, (Minn. Ct. App. 1990) 2

McKenna v. Champion Int'l Corp., 747 F. 2d 1211 (CA 8 1984) . . 8,9,10,16

Moore v. Dispatch Printing Co., 87 Minn 450, 92 N.W. 396 (1902) 2

Nixon v. Dispatch Printing Co. 101 Minn 450, 112 N.W. 258 (1907). . . 3

Ohralik v. Ohio State Bar Assoc., 436 U.S. 447 (1978) 8,9,16,19

Partlow v. Jewish Orphans Home, 645 F2d 757 (CA 9., 1981) 14

Pruneyard Shopping Center v Robins, 447 U.S. 74 (1979) 13

Reich v. Collins, 513 U.S.___, 115 S. Ct. 547, 130 L. Ed.2d 454 (December 6, 1994, U.S.S. Ct. #93-908) 13

Rubin v. Green, 4 Cal 4th 1187, 17 Cal.Rptr. 2d 828, 847 P.2d 1044 (1993) 14,17

Sedco Intern, S.A. v Cory, 683 F.2d 1201 (CA 8 1982). 4

Sparder v. Mueller, 269 Minn. 25, 130 N.W.2d 147 (1964). 3

State v. Thompson, 302 N.W.2d 841 (Minn. 1981) 3

Strauss v. Thorne, 490 N.W.2d 908 (Minn. Ct. App. 1992). 2

Timmis v. Bennett, 352 Mich 355, 89 N.W.2d 748 (1958) 3

Toker v. Pollack, 44 N.Y.2d 211, 376 N.E. 2d 163 (1978). 17

Upjohn Co. v. United States, 449 U.S. 383 (1981) 4,18,19

Virginia Board of Pharmacy v. Virginia Consumers Council, Inc., 425 U.S. 748, (1976) 8

Wirig v. Kinney Shoe Corp. 461 N.W.2d 374 (Minn 1990). 3

Woods v New York Life Insurance Co., 686 F2d 578, (CA 7 1982) 16

CONSITUTIONAL PROVISIONS

U. S. Constitution Amendment I. 18
U. S. Constitution Amendment XIV .13,14

STATUTES

28 U.S.C. 1257 (a). . . . . vii, viii
entered on October 25, 1995.

MISCELLANEOUS

Restatement 2d (Torts) (1977)
Section 586, Section 586 Comment (a) . 12
Article 619, Article 619 Comment (b) . . 5

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

J. PATRICK KITTLER
and LINDA ALT KITTLER,
Petitioners

v.

ECKBERG, LAMMERS, BRIGGS, WOLFF & VIERLING;
KEVIN K. SHOEBERG, ESQ.;
and JON PEDERSON, individually,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

J. Patrick Kittler and Linda Alt Kittler respectfully petition for a writ of certiorari to review the decision of the Minnesota Court of Appeals

---

OPINIONS BELOW

J. Patrick Kittler, et al Appellants

vs.

Eckberg, Lammers, Briggs, Wolff & Vierling,et.al., Jon Pederson, Respondents, 535 N. W. 2d 653 (Minn. Ct. App. 1995), petition for review denied, October 10, 1995); Reconsideration on Denial of Rehearing, _____ N.W. _____ (October 25, 1995)

The denials of Petitioners' petitions in the Supreme Court of Minnesota (Appendix, pp 1 and 2) are unreported..

JURISDICTION

The Decision of the Court of Appeals of the State of Minnesota was filed on August 8, 1995. The Order of the Supreme Court of the State of Minnesota denying petitioners' request for reconsideration of the Order denying petitioners' request for review of the decision of the Court of Appeals was entered on October 25, 1995

The time for filing was extended by the Clerk under Rule 14.5 on January 25, 1996.

Jurisdiction is conferred on the Supreme Court of the United States by United States Code Section 1257 (a) (1988)

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the Untied States of America, Amendments, Article I : " Congress shall make no law... abridging the freedom of speech...."

Constitution of the United States of America, Amendment XIV, Section 1:

> **"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."**

28 USC sect. 1257 (1988) State Courts; certiorari:

> **(a) Final judgements or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari...where any title, right, privilege, or immunity is specially set up or claimed under the Constitution...."**

(Intentionally Blank)

STATEMENT OF THE CASE

This petition arises out of an action for per se defamation originating from a letter written by an attorney which solicited fees and retainers asserted to be for litigation. The action was brought in the District Court for the State of Minnesota, 4th Judicial District, against respondents Kelvin Shoeberg, an attorney, his law firm, and Jon Pederson, Mr. Shoeberg's client.

Respondents twice moved the trial court for summary judgement. At the time of the first motion, petitioners moved to compel discovery of the factual basis for the statements.(Id.,P. 85, 101).

The first motion was continued. The court ordered discovery of the facts upon which the statements in the letter of solicitation were based. (Id.,PP. 35, 42). The second motion was granted based upon absolute privilege. (App.PP 23,24, Trial Court, Conclusions of Law and Order, dated November 15, 1994.)

Petitioners appealed to the Minnesota Court of Appeals, which affirmed, (App.P. 4, Minnesota Court of Appeals, Syllabus, filed August 8, 1995).

Petitioners petitioned the Supreme Court of the State of Minnesota for review,(App.PP. 49-59, Petition for Review of Decision of the Court of Appeals). The Petition was denied on October 10, 1995, (App.P. 2)

Each time they petitioned for summary judgement Respondents asserted, among other things; (a) absolute privilege to publish false and defamatory matter of

another, and (b) a public policy bar to prosecution based upon the client's assertion of the attorney/client privilege, (App.P. 38, Trial Court Findings of Fact, Conclusions of Law, Order and Memorandum, Motion I).

In its Memorandum in Opposition to respondent's first Motion for Summary Judgement, petitioners asserted that the State of Minnesota and other jurisdictions have long held that:

(a) "It is axiomatic that summary judgement should be denied where material facts are in dispute, E.g Strauss v Thorne, 490 N.W.2d 908, 911-12 (Minn. Ct. App. 1992);" McDevitt v. Tilson, 453 N.W.2d 53, 55-7 (Minn. Ct. App. 1990)(App.P. 89, Petitioners' Memorandum in Opposition to Respondent's Motion for Summary Judgement) and,

> It is fundamental to the law of defamation that whether a defendant acted in malice is a factual issue which should be left for the jury. See Lewis v Equitable Life Assur. Soc., 389 N.W.2d 876,890 (Minn. 1986); Moore v Dispatch Printing Co., 87 Minn 450, 92 N.W.396, 397 (1902) (App. P. 101, Petitioners' Memorandum in Support of Motion for a Continuance and to Compel testimony concerning the factual basis of the defense asserted.);

(b) A matter,

"...not presented to the Court for its action

is not a judicial proceeding within the rule..." granting an absolute privilege, Nixon v. Dispatch Printing Co., 101 Minn 309, 112 N.W. 258-259 (1907)(publication of complaint prior to commencement of litigation does not attract the absolute privilege); accord Timmis v Bennett, 352 Mich 355, 89 N.W.2d 748, 752-753 (1958) (holding that an attorney's letter soliciting witnesses for proposed legal action is not privileged, stating that "the mere fact that the defendant contemplated starting an action...does not bring the situation within the generally recognized rule") (App.PP. 89-92, Petitioners' Memorandum in Opposition to Respondent's Motion for Summary Judgement,)

(c) where privilege is conditioned upon:

"...reasonable or probable cause ... actual investigation is required, to determine the accuracy of the statements", Brooks v Doherty, Ruble & Butler, 481 N.W.2d 120, 125 (Minn. 1992); Wirig v Kinney Shoe Corp., 461 N.W.2d 374, 380-81 (Minn 1990) (App.P. 93, Petitioner, Memorandum in Opposition);

(d) It is a fundamental principle of law that an attorney who shares privileged communications with a third party effectively waives any attorney-client privilege. E.g, State v. Thompson, 306 N.W.2d 841, 843 (Minn. 1981); Sparder v Mueller, 269 Minn. 25, 31-2, 130

N.W.2d 147, 151-2 (1964) (App. P. 102, Plaintiff's Memorandum in Support of Motion for Continuance).

(e) That the acceptance of the asserted privileges would effectively deny Petitioners any opportunity for a remedy,(App.P. 92, Petitioner's Memorandum in Opposition; P. 103, Petitioners Memorandum in Support of Motion for a Continuance).

(f) That the attorney/client privilege does not exist with respect to relevant facts as distinct from attorney/client communications, Upjohn Co. v United States, 449 U.S. 383, 395-6 (1981), Sedco Intern. S.A. v Cory, 683 F.2d 1201, 1205 (CA 8 1982) and other cases, (App.PP. 99-100, Petitioners' Memorandum in Opposition to Respondent's Motion for Summary Judgement).

The Honorable Michael Davis denied the motion for summary judgement(App.P. 36, Judge Davis, Order). He ruled that the attorney/client privilege was controlled by Upjohn Co. v United States, supra. He said:

> In the Letter, Mr. Shoeberg refers to allegations against plaintiffs ... The former shareholders (of First Merchant Corporation) had to have obtained facts which led them to believe plaintiffs engaged in such activities. Because such facts were later communicated to an attorney does not prevent disclosure. If defendants had brought litigation concerning the allegations of theft, etc., the factual basis would have to be proffered to prove their claims,

(App.P. 41-42, Judge Davis, Memorandum)

He did not rule on the issues of privilege because the letter was "...to potential clients regarding potential litigation....", (Id.,p. 40) and there were no facts with which to determine whether or not the attorney was acting "...in good faith..."(Id., p. 41) while "in office" (Id.,P. 39) as "an officer of the court" (Id., PP 39, 40):

Judge Davis' granted petitioners' motion for continuance and to compel (App.P. 42, ORDER, February 7, 1994) .

Respondents renewed their motion for summary judgement asserting, among other things:

(1) That the statements contained in the letter and retainer agreement are absolutely privileged, as he (Respondent Shoeberg) contemplated bringing the action in good faith;

(2) ....; and

(3) a bar to prosecution based upon public policy asserted with respect to the attorney/client privilege. Respondent Pederson joined the motion but not the Memorandum of Respondent Shoeberg, et.al. He offered no authority or evidence to support his motion.

The petitioners asserted numerous material facts as in dispute (App. P., 22 and n. 5, Trial Court's Findings of Fact No. 7) and relied on Restatement of Torts 2nd, art. 619, and art. 619, comment b and well established

Minnesota law which specifically requires a jury determination of the material facts, including the issue of the attorneys' good faith, where privilege is asserted as a defense, see, e.g. Lewis v. Equitable Life Assurance Society of the Untied States, 389 N.W.2d 876, 890 (Minn 1986) (App.PP. 82, Petitioners' Memorandum in Opposition to respondent's Renewed Motion for Summary Judgement).

The Petitioners relied upon the Trial Court's rejection of the defense of attorney client privilege when it ruled with respect to the first motion for summary judgement.

In his reply memorandum at page 2, as in his original memorandum in support of the renewed motion, at page 3, Respondent Shoeberg alleged that he had been "...retained to investigate..." and that his letter "...requested that other Ronde Shareholders interested in investigating these possible cause of action send a retainer so that these charges could be investigated and, if corroborated bring an action against the Kittlers."

Since Respondent Pederson had presented no evidence, authority or argument, Petitioners denied that the court had a basis for granting his motion, (App.P 31, Judge Lange Memorandum). They again asserted their right to a jury (App.P. 22 , Judge Lange Findings of Fact #7 and note; App.P. 27, Judge Lange Memorandum).

Mrs. Kittler asserted her right to a trial based upon "... the fact that the retainer agreement sent with the letter does not mention litigation against (her) as

within the scope of the agreement." (App.P. 31, Judge Lange Memorandum)

Judge Lange found that:

> "...Shoeberg did not do the investigation necessary prior to commencing an action. See Minn. R. Civ. P. 11" (Id., PP 29-30) "...there is serious doubt as to whether the claims in the letter could be substantiated by further investigation..." (App.P. 29), and that "Plaintiffs have presented substantial facts demonstrating that there is a material issue of fact as to whether the defendants published the letter from an improper motive."(App.P. 32, n 9,).
>
> Judge Lange said, "...the court assumes that the communication was defamatory and published with malice."(App.P. 22, n. 5, Judge Lange, Findings of Fact). He ruled that:
>
> "Plaintiff's (sic) position is without merit."(Id. P., 27-28, Judge Lange, Memorandum). "Clearly the judicial privilege is an absolute privilege which leaves no question for the jury"(Id., P 59).

Petitioners appealed to the Minnesota Court of Appeals arguing:

(a)There is no public purpose served to permit attorneys to tell untruths while exercising a constitutional

right while holding all other citizens to a standard of truth when exercising the same constitutional prerogative. It contradictory to the underlying rationale of, Bates v. State Bar of Arizona, 433 U.S. 350, (1977)(App.P. 77, Petitioners Brief on Appeal).

(b) Writing to non-witnesses for purposes of money is not "in office". It is a right which inures to all citizens. (Id.)

(c) The absolute privilege of immunity accorded attorneys in the trial court was precluded by the rational underlying the rulings of the U.S. Supreme Court which held as a matter of constitutional law that solicitation by an attorney was a commercial activity.; Bates v. State Bar of Arizona, 433 U.S. 350, (1977), Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), In re R.M.J., 455 U.S. 191, 102 S.Ct. 929, 937 (1982) Virginia Board of Pharmacy v. Virginia Consumers Council, Inc., 425 U.S. 748 at 753, n. 25 (1976) (App.PP. 68-76, Petitioners' Brief on Appeal).

Judge Lange (App.P. 32, n 9) and the Court of Appeals, Judge Huspeni, App.P. 11) both held that the attorney/client privilege would prevent respondents from defending themselves in this action. They cited no authority and did not discuss the law of privilege.

The Appellate Court repeated the citation of the holdings of Bates, (App.P. 8, Opinion), but did not acknowledge petitioners' argument that no privilege can attach to untruthful statements where truthfulness is required as a matter of law (App.P. 68, Petitioners' Brief on Appeal), or petitioners' argument that the Federal

Appeals Courts hold that solicitations are a commercial activity, subject to abuse and must be truthful, McKenna v Champion International Corporation, 747 F2d 1211 (CA 8 1984) and other Federal Appeals court cases cited and discussed therein, (Id.,PP. 68, 75-76).

> **...respondents' position leads to the anomalous conclusion that a lawyer, in exercising a right guaranteed by citizenship rather than by being admitted to the practice of law, is permitted a lower standard of conduct than a private citizen exercising the same right of citizenship. (Id. P. 80, n.11) The rule arbitrarily set lawyers aside as a singularly benefitted class and denies any remedy to petitioners.**

Petitioners petitioned the Minnesota Supreme Court for review of the decision of the Minnesota Court of Appeals. In their petition, the Petitioners argued:

> **(a) The decision requires a development and application of new principles of Minnesota law based upon policies relating to Constitutional jurisprudence and judicial administration (App.P. 54, Petition for Review of a Decision of the Court of Appeals).**

(b) An attorney is exercising a private right when soliciting clients and is not acting in an office to which a right of absolute immunity for untruthful statements may attach. This, Petitioners argued, is the meaning of Bates v State Bar of Arizona, 433 U.S. 350 (1977); Ohralik v

Ohio State Bar Assoc., 436 U.S. 447, 462 (1978) as it has been applied by the Federal Appellate Courts, citing and discussing McKenna v Champion Int'l Corp., 747 F.2d 1211 (CA 8 1984) applied to the facts of the instant case, (App.PP. 55-56, 59);

(c) Acting "in office" is required for the application of the privilege of absolute immunity, Matthis v Kennedy, 243 Minn 219, 67 N.W.2d 413 (Minn. 1954). To the extent that state law would give attorneys greater rights than other persons on the basis of their function as attorneys, with the result that the petitioners are denied a forum for the trial of their claims, state law is controlled by the rulings of the U.S. Supreme Court, (Id. 55-58)

(d) Citing the Court to McKenna v Champion Int'l Corp, 747 F2d 1211 (CA 8 1984), and the cases discussed therein, the Petitioners argued that Federal Appellate Courts have dealt extensively with the issue of solicitation in the context of cases such as the instant case where neither the attorney, his/her client, nor the putative plaintiffs have any fundamental right at stake. Contrary to the rule below, they have consistently found that the interests of the public and the courts preclude solicitation under conditions which harbor the danger, let alone the consequences of untruthful statements, (Id. P., 59)

The Minnesota Supreme Court denied petitioners' request for review of the Decision of the Minnesota Court of Appeals, and the Petitioners promptly petitioned for reconsideration, (App.PP. 45-48). In their petition Petitioners said,

The case meets every test for review. It raises issues of due process and equal protection and issues of particular importance to judicial administration, to commerce, and to the public. (Id., p 3). The Appellate Court Departed from the overwhelming weight of authority to support Judge Lange. It relied upon a single California decision that did not even discuss defamation. It ignored decisions from other states, the Federal Courts and the U.S. Supreme Court dealing with truth in solicitation. (Id., P. 45)

Unless the decision below is reversed or given careful review and thoughtful support, Minnesota will stand alone. It will stand for the blatant and appalling proposition that in soliciting business for themselves, lawyers, unlike any other citizen, may destroy businesses and reputations whenever it seems profitable, and without truth or accountability to those they damage, (Id.)

ARGUMENT:

This petition should be granted because the basic question presented is a matter of first impression in the United States Supreme Court with wide implications and because the rulings below are in conflict with rulings of the Supreme Court, the highest courts of other states and the Federal Appeals Courts.

Although the issues of truth in solicitation and the application of the absolute privilege set out in Restatement (Torts) 2d, s. 586 have been decided with respect to statements made preliminary to litigation by numerous states and Federal Appeals Courts in various contexts, (see authorities below) Petitioners believe that this is the first time that the Supreme Court has been asked to address the question of whether or not a state may accord its attorneys an absolute privilege to base their solicitation of clients on untruthful and misleading statements concerning another where in so doing the state denies that other the only available forum for asserting claims for the damages arising out of the untruthful solicitation. This question was presented to the State of Minnesota for the first time in the courts below.

Petitioners relied upon a long tradition in the Minnesota Courts (supra) and elsewhere (infra) of holding that the absolute privilege is to be narrowly construed and is to be denied where communications take place outside of a judicial proceeding, or where the actor acted out of office, or where the communication is not necessary to achieve the objects of the judicial proceeding. This was asserted together with Minnesota State Supreme Court, other state court of last resort, Federal Courts of Appeals and U. S. Supreme rulings with respect to these issues and the dispositive issues of public policy and right to trial of the asserted material fact issues. Denial of the Petitioners' fundamental right to a forum in which to try their claims and the fundamental denial of justice resulting from providing attorneys with a singular right of immunity from accountability to those they injure by employing untrue and misleading statements while soliciting clients was argued at every level.

The failure of due process and equal protection under the Fourteenth Amendment to the United States Constitution were offered in Petitioners' petitions to the Minnesota Supreme Court when it had become apparent that Petitioners could not rely upon the validity of the earlier decisions or the controlling influence of the decisions of the U. S. Supreme Court, the Federal Appeals Courts or the highest courts of other states, see Pruneyard Shopping Center v Robins, 447 U.S. 74, 86, n. 9, 87 (1979), Lemon v Kurtzman, 411 U.S. 192, 206-207, ; see also Reich v Collins, 513 U.S.___, 130 L. Ed.2d 454, 460 (December 6, 1994, U. S. S. Ct # 93-908).

To deny claimants the only available forum for the trial of their claims is a denial of a fundamental right of due process under the Fourteenth Amendment, Gibbs v Zimmerman, et.al., 290 U.S. 326 (1933). Granting attorneys immunity from the consequences of their untruthful statements in solicitation while holding all others liable for the same activity is a denial of equal protection under the same Amendment. When the result is denial of a forum to one who has been injured by untruthful statements, the grant of privilege impairs the fundamental rights of others. In this event the state must show a compelling or overriding need of state government for the impairment of the fundamental right. The federal and state courts holdings cited herein clearly condemn such policy arguments as were employed below.

If the state can show a sufficiently important interest, the method chosen to meet the need must directly and materially advance the interest and must narrowly craft the privilege so as to restrict the impairment of the rights of others as little as possible. California for

example provides a remedy at the end of the principal litigation, where that takes place. A recent California case, Laffer v. Levinson , 34 Cal. 4th 117, 40 Cal. Rptr. 2nd 233 (1995), Cert. denied July 20, 1995, denied the privilege.

Denial of the only available forum for the trial of petitioners' claims is the practical effect of the decisions taken below. Although the courts below talk about Petitioners' suit as not being the proper vehicle to determine the merit or lack thereof of respondents' claims against petitioners, it is clear from this case that Minnesota will not presently entertain an action where the statements said to be false do not result in litigation and the rule below would presumably prevent petitioner's from asserting a counterclaim, if the respondents had commenced litigation, compare Rubin v Green, 847 P.2d 1044 (1993). California attempts to meet the need for a forum by allowing "... a derivative tort action for communications within the privilege (which are) delayed until the original suite is terminated in favor of the derivative plaintiff...".

It is a denial of Fourteenth Amendment due process for a court to deny litigants access who have no other available forum for the recovery of damages for a commonly recognized claim. Gibbs v Zimmerman, et.al., 290 U. S. 326 (1933) See Partlow v Jewish Orphans Home, 645 F2d 757, 759 (AC 9, 1981) where the 9th Circuit said,"yes" as to notice by the trial court because the circumstances raise "due process" issues.

Minnesota has decided an important federal question in a way which conflicts with the decision of

another state court of last resort and of a United States Court of appeals:

Where neither the client's nor the attorney's interests in soliciting for additional litigants nor the putative plaintiff's interests in participating in the proposed litigation are grounded in any fundamental right, is there a compelling reason for a state court to deny other litigants the only remedy available to them for the determination of their claims? Under these circumstances, the following federal appeals courts have decided that the courts of their federal circuit do not have a compelling or even a legitimate need to grant immunity, or to facilitate solicitation of putative plaintiffs which exceeds the putative defendant's right to be free of the dangers and damages of false or misleading statements, or which exceeds the injured parties' right to a forum for the trial of claims arising out of the solicitation:

They are all situations in which the facts parallel those alleged to be important by the Courts below:

1. The purpose of the communication was solicitation of additional clients for possible litigation, (App. P. 5, Court of Appeals, Facts; P. 21, Judge Lange, Findings of Fact).

2. The attorney had at least one client whose interests he was said to represent in seeking the right to solicit additional clients, (Id. P. 4).

3. The prospective recipients of the solicitation were all said to be prospective parties.(Id.).

4. There is a dispute as to the truth of the allegations made in the letter of solicitation, (App. PP. 102, Memorandum in Support of Motion to Compel).

These cases help differentiate communications which take place within the context of a judicial action, or are constitutionally or legislatively mandated or protected from cases in which communications by the same actors take place before or during the judicial action and serve only the commercial or personal interests of the communicator. They are cases which were offered to the courts below, (App.P. 4., Petition for Reconsideration ; P 17, Petition for Review).

Where access to the court for purpose of litigating the claims in question is not in question the due process rights of putative plaintiffs are not at stake and the court need not protect them, Dolan & Lee vs. Project Const. Corp., 725 F2d 1263, 1268 (CA 10 1984).

There is no good reason for judicial sponsorship prior to the stage in litigation where there has been determination that Plaintiffs allegations have merit, Id., Woods v New York Life Insurance Co., 686 F2d 578 (CA 7 1982), Kinney Shoe Corp. v Vorhes, 564 F2d 859 (Ca 9 1977), McKenna v Champion International Corporation, 747 F2d 1211 (CA 8 1984). (Notice serves primarily to procure remunerative employment for the attorney. Strong ethical and policy considerations against solicitation and alternative means of communication with the members of the class exist.) This case is one involving a "non-public attorney whose interest in solicitation centers on the aggrandizement of fees". Like Ohralik,

and unlike Primus it furthers no "associational" interests, McKenna @ 1216.

The following state courts of last resort have decided claimants may not be denied access to a forum in which to have a determination on the merits of claims arising out of statements made in communications with third parties having no fundamental right or other direct involvement with the proposed litigation where the communication takes place prior to the commencement of litigation:

New York: Toker v Pollack, 376 N.E. 2d 163 (The communication of a complaint even to a District Attorney...does not constitute an incident to a judicial proceeding, Id. at 163), relied upon in Gold v Intersoft Corp., 489 N.Y.S.2d 660, 662 (1985). (Letter written to corporation's board of directors informing them that attorney's client intended to bring action against former officer and director and soliciting the involvement of the corporation as a plaintiff, held not absolutely privileged.)

California: Rubin v. Green,et.al., 847 P.2d 1044, 1049 (Cal. 1993) California recognizes that there is a need to meet the need for a forum by allowing "... a derivative tort action for claims arising from communications within the privilege (which is) delayed until the original suite is terminated in favor of the derivative plaintiff...".

Arizona: Green Acres Trust v London, 688 P.2d 617 (Ariz. 1984)(Held: News reporter and putative plaintiffs solicited via a press release and distribution of an unfiled complaint do not have a sufficiently close or

direct relationship with proposed litigation. No public purpose is served.).

Minnesota has decided a Federal Question in a way which conflicts with a relevant decision of the United States Supreme Court:

Where an attorney and his client join in an intentional tort and a state court (a) denies the injured persons the only available remedy for the determination of claims to recover lost property and impairment of fundamental liberties, and/or (b) bestows upon the attorney and his client standing as classes of persons who are immune from the claims of persons injured by their intentional tort, does Upjohn Co. v United States, 449 U.S. 383 (1981) allow that denial to be justified by attorney client privilege and possible conflict of interest between an attorney and his client/co-defendant?

The Trial Court, in hearing the first motion for summary judgement, ruled that Upjohn controlled the decision with respect to the respondent attorney's claim that he would be required to disclose information communicated to him by his client within the attorney/client relationship in order to adequately defend himself. Judge Davis ruled that the statements in the solicitation imply specific acts of wrongdoing, are verifiable and ordered the respondents each to submit themselves to sworn testimony, to produce documents and to answer interrogatories with respect to the factual basis supporting his defense to petitioners action and the circumstances surrounding the mailing of the letter of solicitation, (App.P. 42, Judge Davis, Order). Judge Davis reasoned that if the respondents had brought their action

on the basis of the allegations made in the letter the same factual basis would have to be offered in court, (App.P. 47, Judge Davis, Memorandum). The Trial Court hearing the second motion raised an issue of conflict of interest on the basis of the attorney/client relationship and used it to support, in part, its decision to grant a privilege of absolute immunity, (App. PP. 63, note 9, 64, Judge Lange, Memorandum). It did not support this decision with authority or discuss it beyond commenting on the presumed difficulty of explaining the relative responsibility of the two respondents for the content of the letter. The Court of Appeals did not discuss the rule announced in Upjohn, supra, or adopted by Judge Davis in ruling on respondents' first motion. It did not cite any authority. Judge Davis clearly believed that the Upjohn holding applies to the statements made in the letter of solicitation. It is equally clear that the Court of Appeals did not believe that it was controlled by this ruling of the Supreme Court.

Is the capacity of an attorney that of a private citizen exercising a private right under the First Amendment when soliciting clients, or that of an officer of the court discharging a public responsibility controlled by the decisions of the United States Supreme Court in Bates v State Bar of Arizona, 433 U.S. 350 (1977); Ohralik v Ohio State Bar Assoc., 436 U.S. 447, 462 (1978) and cases in this line which balance the attorney's First Amendment rights against the fundamental rights of others? (App.PP. 13-17). The Minnesota Court of Appeals declined to follow these holdings.

For the reasons given the petitioners seek a writ of the Untied States Supreme Court providing for review of the decision of the Court of Appeals.

HVASS, WEISMAN & KING CHARTERED
by Richard A. Williams, Jr. (#117559)
100 South Fifth Street, Suite 450
Minneapolis, MN 55402
(612) 333-0201

Counsel for the Petitioners

STATE OF MINNESOTA
IN SUPREME COURT
C8-95-462

J. Patrick and Linda Alt Kittler,
Appellants,
vs.

Eckberg, Lammers, Briggs, Wolff & Vierling, et al.,
Respondents,
John Pederson,
Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that J. Patrick and Linda Alt Kittler's request for reconsideration of the denial of their petition for further review be, and the same is, denied.

Dated: October 25, 1995

BY THE COURT:

s/A.M KEITH
Chief Justice

STATE OF MINNESOTA
IN SUPREME COURT
C8-95-462

J. Patrick and Linda Alt Kittler,
Appellants,

vs.

Eckberg, Lammers, Briggs, Wolff & Vierling, et al.,
Respondents,

John Pederson,
Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of J. Patrick and Linda Alt Kittler for further review be, and the same is, denied.

Dated: October 10, 1995

BY THE COURT:

s/A.M.KEITH

Chief Justice

STATE OF MINNESOTA
IN COURT OF APPEALS
C8-95-462

Hennepin County
District Court File No. 935920
Huspeni, Judge

J. Patrick Kittler, et al.,
Appellants,
Richard A. Williams, Jr.
Hvass Weisman & King Chartered
Suite 450, 100 S. Fifth St.
Minneapolis, MN 55402

vs.

Eckberg, Lammers, Briggs, Wolff & Vierling, et al.,
Respondents,
Richard J. Thomas
Byron G. Ascheman
Geraghty, O'Loughlin & Kenney, P.A.
1400 Capital Centre
386 N. Wabasha St.
St. Paul, MN 55102
Jon Pederson,
Respondent.
Terrence J. Fleming
Jonathan Saffold, Jr.
Lindquist & Vennum, P.L.L.P.
4200 IDS Center
80 S. Eighth St.
Minneapolis, MN 55402

Filed: August 8, 1995
office of Appellate Courts

SYLLABUS

Allegedly defamatory statements about defendants in a potential lawsuit made by an attorney soliciting additional plaintiffs for that lawsuit are protected by an absolute judicial action privilege.

Affirmed.

Considered and decided by Norton, Presiding Judge, Huspeni, Judge, and Schultz, Judge.[1]

O P I N I O N

HUSPENI, Judge

Statements in a letter sent out by an attorney to solicit additional plaintiffs for his client's potential lawsuit against appellants were allegedly defamatory. The district court awarded summary judgment to respondents (the attorney, his law firm and the client), on the grounds that the statements were protected under the judicial action privilege. Because the letter was a communication preliminary to a judicial proceeding proposed in good faith, we hold that the privilege applies and affirm the summary judgment.

FACTS

Respondent Kevin K. Shoeberg, an employee of respondent law firm Eckberg, Lammers, Briggs, Wolff & Vierling, was contacted by respondent Jon Pederson in regard to the possibility of the former shareholders of the Ronde Corporation bringing an action against the corporation's officers and directors, appellants J. Patrick Kittler and his wife, Linda Alt Kittler. Shoeberg then sent 56 former shareholders a letter beginning:

---

[1]Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

> I am writing this letter at the request of various former shareholders of the Ronde Corporation and First Merchants Corporation. I have been contacted by Jon Pederson regarding the possibility of bringing an action against Pat Kittler and his wife for, among other things, theft of corporate property, fraud misrepresentation, and breach of fiduciary duty as an officer. We have only done a preliminary investigation.

The letter also said that the firm would need a $10,000 retainer fee before undertaking representation of the shareholders.

The Kittlers then brought a defamation action. against Pederson, Shoeberg, and the law firm, alleging that the letter contained defamatory statements. Respondents moved for summary judgment, contending that the record established that the statements were made in good faith contemplation of litigation and were therefore protected by an absolute, or in the alternative a qualified, judicial action privilege.

The district court concluded that respondents had seriously contemplated litigation against appellants, that the statements made in connection with that proposed litigation were protected by an absolute privilege, and that public policy favored summary judgment; the district court declined to address the issue of qualified privilege. In a memorandum accompanying the denial of summary judgment, the district court observed that in their letter respondents did not claim their investigation had been sufficient for the purposes of bringing a lawsuit; they said they had conducted only preliminary investigation and would need a retainer fee before beginning a lawsuit. The court also noted that "the letter was clearly a solicitation for additional clients."

On appeal, appellants argued that because the letter solicited new clients, its contents were not protected by the judicial action privilege.

ISSUE

Does the judicial action privilege protect a communication made preliminary to a proposed judicial proceeding if that communication solicits additional plaintiffs?[2]

ANALYSIS

> On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the lower courts erred in their application of the law.

State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). "[W]hether a [defamatory] communication is privileged is a question of law for the court to decide." Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 890 (Minn. 1986). A reviewing court is not bound by and need not give deference to a trial court's decision on a purely legal issue. Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984). Therefore, we review de novo the district court's determination that the letter was privileged.

In awarding summary judgment to respondents, the district court relied on Restatement (Second) of Torts, § 586 (1977), adopted as the law of Minnesota in Matthis v. Kennedy, 243 Minn. 219, 228, 67 N.W.2d 413, 419 (1954):

> An attorney at law is absolutely privileged to publish false and defamatory matter of another

---

[2]Because we conclude that an absolute privilege applies, we do not address the issue of qualified privilege.

> in communications preliminary to a proposed judicial proceeding, * * * if it has some relation thereto.[3]

The phrase "preliminary to a proposed judicial proceeding" is interpreted in comment e to section 586 in Restatement (Second) of Torts:

> As to communications preliminary to a proposed judicial proceeding the rule stated in this Section applies only when the communication has some relation to a proceeding that is contemplated in good faith and under serious consideration. The bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered.

Summary judgment was granted on the basis that respondents intended to sue appellants, that the letter was related to a lawsuit contemplated in good faith, and that its contents were therefore absolutely privileged.

Appellants argue that they are entitled to bring an action for defamation because respondents' letter was a letter of solicitation allegedly containing false or misleading statements about appellants and letters of

---

[3]The language has been updated in Restatement (Second) of Torts (1977), where section 586 reads:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding * * * if it has some relations to the proceeding.

solicitation are not protected by the judicial action privilege.[4]

Attorneys' letters of solicitation are protected as commercial free speech pursuant to In re Appert & Pyle, 315 N.W.2d 204 (Minn. 1981). Appert cites Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691 (3.977)', which held that a prohibition on lawyer advertising was unconstitutional.

> Our application to this case of the Bates analysis that considers the state interests being served by the disciplinary rules prohibiting advertising and the combined interests of [attorneys'] right to free speech and the public's right to receive commercial information requires that we conclude [attorneys'] conduct in distributing written [advertising] materials was constitutionally protected.

Appert, 315 N.W.2d at 209. Appert also cites Bates for the proposition that false, deceptive or misleading information is not protected speech. Id. at 208.

---

[4]Although appellants had not raised their "solicitation" argument when opposing respondents' motion for summary judgment, the district court noted in its memorandum that "the letter was clearly a solicitation for additional clients." While mindful of the prohibition against reviewing matters not presented to and considered by a district court, Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988), we address this issue because the district court obviously did so, even though it was not presented by the parties.

Appellants argue that because respondents' letter was a solicitation, protected as commercial free speech only if it is truthful, it cannot also be a "communication preliminary to a proposed judicial proceeding," absolutely protected whether it is truthful or not. Respondents do not deny that the letter was a solicitation, but argue that it was also protected as preliminary to a proposed judicial proceeding. We agree.

Appellants offer no support for their view that a letter soliciting potential plaintiffs and a communication preliminary to a proposed judicial proceeding are mutually exclusive. While Minnesota courts have not addressed this question, the California Supreme Court recently did so in Rubin v. Green, 847 P.2d 1044 (Cal. 1993). The plaintiff in Rubin was a mobile home park owner who alleged that an attorney had wrongfully solicited residents of the park in an effort to bring an action against the owner regarding park conditions, thus interfering with the contractual relationship between owner and residents. The California Supreme Court, in reversing the California Court of Appeals and reinstating the trial court's dismissal of plaintiff's complaint, stated:

> We granted review in this case to consider whether a defendant in an impending civil action may sue the attorneys for the opposing party on the ground that they wrongfully "solicited" the litigation against him. We conclude that this proceeding not only undermines the established policy of allowing access to the courts, but that, given the availability of other remedies for the redress of attorney solicitation, this retaliatory suit is not maintainable.

Id. at 1045. Rubin specifically rejects the argument that the "communicative" nature of the law firm's acts in

soliciting clients was secondary to the solicitation nature, and therefore not protected.

> [W]e can imagine few communicative acts more clearly within the scope of the privilege than those alleged in the amended complaint, that is, meeting and discussing with [potential plaintiffs] * * * the merits of the proposed * * * lawsuit.

Id. at 1048. We find the rationale of the California Supreme Court persuasive and conclude that respondents' letter in this case is also within the scope of the judicial action privilege. In bringing the letter within that scope, we also determine, as did the district court, that the letter was a communication related to a judicial proceeding that was contemplated in good faith and under serious consideration. Restatement (Second) of Torts, § 586, comment e.

We recognize that there are differences between Rubin and this case, but those differences do not compel a contrary result here. Rubin was an action for violation of the statute governing attorney solicitation, not a defamation action. The complaints in both, however, alleged similar harm from the attorneys' activities:

> The complaint alleged that * * * the law firm had "embarked on a malicious effort to harm [Rubin's] economic and business standing by stirring up animosity among [potential plaintiffs,] utilizing fear, intimidation and coercion against [them], and communicating the false promise of frivolous litigation as a means to profit unjustly at [Rubin's] expense."

Id. at 1046. The complaint in this case alleged that the letter contained false and defamatory statements which damaged the appellants' reputations. Both Rubin and this

case involve actions brought by potential defendants who alleged harm from an initial step in the litigation process: contacting all potential plaintiffs. The court in Rubin faced the same issue we face here: "whether a defendant in an impending civil action may sue the attorneys for the opposing party on the ground that they wrongfully 'solicited' the action against him. Id. at 1045. The fact that Rubin alleged damage from solicitation while appellants here allege damage from defamation is not a meaningful distinct-ion.

Appellants argue here, as they did before the district court, that a material fact issue exists, thus precluding summary judgment. Appellants cite the lack of evidence in the record to support the truth of respondents' allegations of appellants' dishonesty, argue that no reasonable trier of fact could conclude that respondents' statements in the letter were true, and claim that in a trial on the underlying action, appellants would be entitled to summary judgment.

Appellants' arguments are meritless. There are no material fact issues in this case. It was the actions of appellants themselves that "froze" the record at the stage we now receive it. By bringing an action against respondents, appellants effectively prevented respondents from going forward with any potential lawsuit against appellants. Appellants' actions created a conflict of interest between Pederson and his attorneys, and placed those attorneys in an untenable position. They could neither go forward with the underlying action, thus demonstrating that the communication was in fact made preliminary to a judicial proceeding, nor could they defend themselves in this action without violating the attorney-client privilege.

Finally, we note the existence of significant public policy arguments favoring extension of the judicial

privilege to acts which both solicit and communicate. As observed by the court in Rubin:

> Undergirding the immunity conferred by [the judicial privilege] is the broadly applicable policy of assuring litigants the utmost freedom of access to the courts * * * without fear of being harassed subsequently by derivative tort actions.

Id. at 1047 (quotations and citations omitted). The court, however, was not insensitive to the growing concern with the large volume of litigation filed in the courts in recent years. While the Rubin court spoke in the context of controls on malicious prosecution suits, we find its analysis equally applicable in this case:

> [T]he better means of addressing the problem of unjustified litigation is through the adoption of measures facilitating the speedy resolution of the initial lawsuit and authorizing the imposition of sanctions for frivolous or delaying conduct within that first action itself, rather than through an expansion of the opportunities for initiating one or more additional rounds of malicious prosecution litigation after the first action has been concluded.

Id. at 1050 (quotation omitted).

Finally, we concur fully in the observations of the district court in this case:

> [T]his action is not the proper vehicle to determine the merit or the lack thereof of [respondents'] claims against [appellants]. By bringing this action, [appellants] effectively obstructed the ability of [respondents] to have

> their claims against [appellants] heard by a Court of proper jurisdiction. This is exactly the result the judicial privilege was designed to prevent.

The district court was correct. Both the public policy concerns and the interests of these litigants can best be served by resolution of the underlying issues in a proceeding other than this defamation action.

DECISION

The district court's decision that the absolute judicial action privilege applies to all communications made preliminary to proposed litigation contemplated in good faith is in accord with both common law and public policy.

Affirmed.

Law Offices of
Eckberg, Lammers, Briggs, Wolff & Vierling

February 26, 1993

TO: Former Shareholders of Ronde Corporation/First Merchants Corporation

Ladies and Gentlemen:

I am writing this letter at the request of various former shareholders of the Ronde Corporation and First Merchants Corporation. I have been contacted by Jon Pederson regarding the possibility of bringing an action against Pat Kittler and his wife for, among other things, theft of corporate property, fraud and misrepresentation, and breach of fiduciary duty as an officer. We have only done a preliminary investigation. It appears that the Minnesota Trade Trust which was an asset of the Ronde Corporation/First Merchants Corporation has become the asset of Patrick Kittler and his wife. It is our understanding that the Ronde Corporation/First Merchant Corporation initially created the Minnesota Trade Trust and was the beneficial owner of the trust.

Based on a consolidated balance sheet which I reviewed dated January 30, 1989, First Merchants Corporation had total assets of $168,725.00.

As a result, we have been requested by several of the former shareholders to commence an action to impose

a constructive trust on the Minnesota Trade Trust and to commence action against Patrick Kittler.

This letter is being sent to you as a former shareholder of the Ronde Corporation or First Merchants Corporation. In order for us to undertake representation of the former shareholders, we have indicated that we would require a retainer of $10,000.00. As a result, we are contacting approximately 54 former shareholders of the Ronde Corporation/First Merchants Corporation in an attempt to raise the appropriate funds for the retainer. We have also enclosed a blank retainer for each shareholder to sign which authorizes us to commence action on your behalf.

I would contemplate that if enough of the shareholders contribute, the contribution per shareholder would be a maximum of $200.00. We have already received the sum of $1,000.00 from various shareholders. We will undertake representation of the former Ronde Corporation/First Merchants Corporation shareholders once we have received the retainer. I have agreed that any attorney's fees in excess of $20,000.00 shall be recovered out of the proceeds of the lawsuit. Therefore, you will only be making a contribution toward the retainer at the beginning of the case. Obviously, if we do not recover anything, we are out all of our fees which exceed the sum of $10,000.00.

In enclosing the retainer agreement, we are specifically requesting that each one of you sign the retainer and return it to us along with your check. You will note that the retainer agreement specifically indicates that you are waiving any conflict of interest there may be a s a result of our prior representation of a creditor of the Ronde Corporation and fellow shareholder by the name of Floyd Johnson. The agreement which I have reached with the former shareholders of Ronde Corporation is that Mr. Johnson will be the first creditor to be paid from the

proceeds from any sums which we recover, after payment of costs and attorney's fees, from Mr. Kittler or the Minnesota Trade Trust. I have already contacted Mr. Johnson who has agreed that we could undertake representation of the former Ronde Corporation/First Merchants Corporation shareholders. Since Mr. Johnson already has a judgment against the Ronde Corporation, I believe that the conflict is minimal.

However, I should advise you to seek the advice of independent legal counsel to determine whether you are willing to waive any potential conflict of interest there may be between our representation of Mr. Johnson and his action against the Ronde Corporation and our representation of you in an action against the Minnesota Trade Trust and Patrick Kittler.

As soon as I have received the sum of $10,000.00, we will begin drafting a Summons and Complaint to be served on the appropriate parties.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

Kevin K. Shoeberg

KKS:sdb

Enclosure
cc: Individuals listed on the
attached Exhibit "A"

Law Offices of
Eckberg, Lammers, Briggs, Wolff & Vierling

RETAINER AGREEMENT

1. Client: Former shareholders of Ronde Corporation/First Merchant's Corporation

2. Nature of Services: Litigation regarding theft or misrepresentation of corporate assets, fraud and misrepresentation by Patrick Kittler, and imposition of constructive trust on assets of Minnesota Trade Trust

3. Fee Arrangement: Client will be charged $100.00 per hour for all services rendered on his/her behalf.

4. Retainer: A retainer of $5,000.00 must be paid by client before any work is done on this case. An additional $5,000.00 must be paid for a total retainer of $10,000.00. Any additional fees will be charged and collected from any proceeds collected from the Minnesota Trade Trust or Patrick Kittler.

IT IS AGREED:

A. The retainer will be credited against the overall fee. The balance of fee over retainer is to be paid in full monthly as the bill is rendered, unless other arrangements are made in writing with the responsible attorney. The bill must be paid in full when the case is concluded.

B. Attorney may withdraw from representation if client does not abide by the fee payment terms set forth above)or with other obligations of the contract) or if the client

unreasonably refuses to cooperate with the attorney on the case.

C. Client is responsible for costs in addition to fees for such expenses advanced by attorney for filing and recording fees, depositions, medical or official reports, photographs, telephone charges, fax charges, travel and living expenses for travel outside the Twin Cities metro area as required by client's direction and similar expenses as otherwise provided in writing.

D. Client reserved the right to discharge attorney at any time, but is responsible for all fees and cost incurred up to the time of receipt of written notice of discharge by the attorney.

E. Client is entitled to an itemized statement and/or status report of fees and costs, if requested at any time during representation.

F. Time included at the hourly rate shall include, but not be limited to the following: Time spent in conferences with client, opposing party, opposing attorney, witnesses and any telephone calls relating to the representation of the client, drafting documents, research, time spent in court (and traveling to and from court), hearings, investigations and depositions.

G. By acceptance of this Agreement, client acknowledges that failure to comply with the terms herein will result in legal collection action and that client will be responsible for any costs incurred for same.

5. Additional Provision:

It is expressly understood and agreed that the former shareholders of Ronde Corporation/First Merchants Corporation and Ronde Corporation/First Merchants Corporation waive any conflict of interest which may be present by virtue of this firm representing them as it relates to Floyd Johnson, a creditor of Ronde Corporation/First Merchants Corporation, which this firm has also represented. The shareholders and the corporation acknowledge that they have been advised of a possible conflict and to seek advice from another attorney regarding the possible conflict.

Dated this _____ day of _____, 1993.

I have read and fully understand the above Retainer Agreement, agree to its terms and acknowledge receipt of a copy of it.

RONDE CORPORATION/FIRST MERCHANTS CORPORATION

Dated: _____ By: _____

_____

Its: _____

Dated: _____ _____

Floyd Johnson

ACCEPTANCE

I hereby accept the Retainer Agreement and the terms set forth above.

ECKBERG, LAMMERS, BRIGGS, WOLFF & VIERLING

Dated: _____ By: _____

Kevin K. Shoeberg

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DIST

J. Patrick Kittler and
Linda Alt Kittler,

Plaintiffs,

vs.

Eckberg, Lammers,
Briggs, Wolff &
Vierling; Kevin K.
Shoeberg, Esq., and
Jon Pederson, individually,

Defendants.

District Court
File No. MC93-05920

FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER

The above-entitled matter came on for hearing before the Honorable Steven Z. Lange, one of the Judges of this Court, on the 28th day of September, 1994.

Howard R. Orenstein, Esq., appeared on behalf of plaintiffs.

Bryan G. Ascheman, Esq., appeared on behalf of defendant Kevin K. Shoeberg, Esq.,

Jonathan Saffold, Jr., Esq., appeared on behalf of defendant Jon Pederson.

Upon all the files, records, and proceedings herein, the arguments of counsel, and the Court being fully advised in the premises, now makes the following:

FINDINGS OF FACT

1. That plaintiffs' defamation suit claims they were defamed by defendants Jon Pederson and Kevin Shoeberg, Esq., by virtue of a letter and retainer agreement which Shoeberg mailed to prospective clients in contemplation of commencing a lawsuit against plaintiffs.

2. That Shoeberg's letter, dated February 26, 1993, was sent to former shareholders of Ronde/First Merchant's Corporation. It stated that:

> I am writing this letter at the request of various former shareholders of the Ronde Corporation and First Merchants Corporation. I have been contacted by Jon Pederson regarding the possibility of bringing an action against Pat Kittler and his wife, for, among other things, theft of corporate property, fraud and misrepresentation, and breach of fiduciary duty as an officer. We have only done a preliminary investigation. It appears that the Minnesota Trade Trust which was an asset of the Ronde Corporation/First Merchants Corporation has become the asset of Patrick Kittler and his wife. It is our understanding that the Ronde corporation/ First Merchant's Corporation initially created the Minnesota Trade Trust and was the beneficial owner of the trust.

3. That no action against plaintiffs was ever commenced.

4. That in November, 1993, defendants moved Judge Davis for summary judgment, claiming that the statements in the subject letter are absolutely privileged, qualifiedly privileged and made without malice, and/or protected opinion. Additionally, defendants argued that

public policy prevents a suit such as this, since such litigation would force an attorney to disclose information protected by the attorney/client privilege.

5. That on February 7, 1994, Judge Davis entered an order continuing the aforesaid motion pursuant to Minn. R. Civ. P. 56.06. Judge Davis determined that the letter was subject to an absolute judicial privilege if it was published in good faith contemplation of litigation.

6. That defendants now renew their summary judgment motions, contending that the record clearly establishes that the letter was published in good faith contemplation of litigation.

7. That plaintiffs contend that summary judgment is inappropriate, because the following facts establish at least a dispute as to whether defendants contemplated litigation in good faith:[5]

a. No action has been filed against plaintiffs.

b. Shoeberg's retainer agreement did not mention a possible action against Mrs. Kittler. Additionally, Shoeberg admitted that at the time he sent the letter, he was not certain that there was a valid cause of action against Mrs. Kittler.

---

[5]Plaintiffs identify additional facts which they claim create a factual dispute as to whether litigation was contemplated in good faith. Pl. Mem. Opp. S.J. at 8-11. However, those facts do not go to the issue whether litigation was contemplated in good faith, but rather whether the communication was defamatory. For the purposes of this motion, the Court assumes that the communication was defamatory and published with malice.

c. Kittler denies having received a letter from Shoeberg which purportedly gave him the opportunity to exculpate himself.

d. Mrs. Kittler was given no opportunity to respond to the charges against her.

e. Shoeberg made little or no effort to verify the information in the letter by examining corporate books and records.

f. Over the past several years, Pederson has been involved in a concerted effort to discredit plaintiffs.

CONCLUSIONS OF LAW

1. That the question of whether an absolute privilege applies to a defamatory communication is a question of law for the Court to decide. Lewis v. Equitable Life Assurance Society, 389 N.W.2d 876, 890 (1986).

2. That the record clearly indicates that defendants did seriously contemplate initiating litigation against the plaintiffs.

3. That insofar as the subject letter was published in serious contemplation of litigation, it is protected by an absolute privilege pursuant to Restatement (Second) of Torts Secs. 586-87 (1965).

4. That there are additional public policy considerations which favor the award of summary judgment herein.

5. That insofar as the Court has determined that the subject communication is protected by an absolute privilege, the Court need not decide whether the communication is also protected by a qualified privilege.

Based on the foregoing,

IT IS HEREBY ORDERED:

1. That the motion of defendants Eckberg, Lammers, Briggs, Wolff & Vierling and Kevin K. Shoeberg, Esq., for summary judgment is GRANTED.

2. That the motion of defendant Jon Pederson for summary judgment is GRANTED.

3. That the attached memorandum is incorporated herein by reference.

4. That copies of this order shall be sent to counsel for the parties which shall be proper service for all purposes.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Dated: November 15, 1994

Steven Z. Lange
Judge of District Court

Memorandum

Summary judgment is proper when no material issues of fact exist and one party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. A fact is material if its resolution would affect the outcome of the case. Zappa v. Fahey, 310 Minn. 555, 556, 245 N.W.2d 258, 259-60 (1976) (per curium); Krawczewski v. Western Casualty & Surety Co., 506 N.W.2d 656, 658 (Minn. App. 1993). Facts are to be viewed in the light most favorable to the non-moving party. City of Virginia v. Northland Office Properties, 465 N.W.2d 424, 427 (Minn. App. 1993.), pet. for rev. denied (Minn. Apr. 18, 1991).

This is defendants' second summary Judgment motion. In the first summary judgment proceeding, Judge Davis determined that the February, 1993, letter herein might be protected by an absolute or a qualified privilege. However, insofar as the parties had not yet completed discovery, and the record was insufficient to determine whether defendants seriously and in good faith contemplated litigation, judge Davis continued the summary judgment pursuant to Minn. R. Civ. P. 56.06.

According to Matthis v. Kennedy, 243 Minn. 219, 225, 67 N.W.2d 413, 416 (1954), there are two categories of privilege--absolute and qualified (or conditional). A qualified privilege may extend to a communication:

> made upon a proper occasion, from a proper motive, and [based] upon reasonable or probable cause. When so made in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel. Actual malice must be proved before there can be a recovery.

Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 256-57 (Minn. 1980). In the case of qualified privilege, the court must decide as a matter of law whether the communication is subject to a privilege. Lewis v. Equitable Life Assurance Soc'y of the United States, 389 N.W.2d 876, 890 (Minn. 1986). However, "the question whether the privilege was abused is a jury question." Id. (citing Restatement (Second) of Torts, Sec. 619 (1977)).

In contrast, an absolute privilege bars a defamation suit even where a communication is defamatory and published with malice. Matthis, at 225, 67 N.W.2d at 416. Whether a communication is subject to an absolute privilege is a question of law which must be decided by the Court.

Plaintiff contends that the judicial privilege considered here is more appropriately categorized as a qualified privilege, since for it to apply, there must be a determination that litigation was seriously and in good faith contemplated. Plaintiff further contends that such a determination is a question of fact which must be made by the jury. Plaintiff's position is without merit.

The Restatement (Second) of Torts, Section 586 (1977) provides:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or

> during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

(emphasis added). Comment (a) to section 586 provides:

> As to communications preliminary to a proposed judicial proceeding the rule stated in this Section applies only when the communication has some relation to a proceeding that is contemplated in good faith and under serious consideration. The bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered.

Clearly, the judicial privilege is an absolute privilege which leaves no question for the jury under Lewis, despite the fact that the Court must determine whether litigation was seriously considered. [6]

In fact, the Court found only one case in which a Court determined that the Court could not decide the applicability of the Restatement's judicial privilege as a matter of law. In Arundel Corp. v. Green, 540 A.2d 815, 819 (Md. App. 1988), a Maryland appellate court stated:

> Whether the attorney has met his burden of proving the relationship between the defamatory statement and the anticipated

---

[6]Plaintiffs note that defendants failed to cite a single case in which a court determined the issue of good faith as a matter of law. However, plaintiffs similarly fail to cite a single case in which the issue of good faith was reserved for the jury.

> judicial proceeding is one of law for the court unless there is a dispute as to whether or not that relationship in fact existed.

Because the Arundel court determined that there was a dispute of fact as to whether the defamatory material was related to an anticipated judicial proceeding, it reversed the trial court's award of summary judgment. Id.

Such a result is clearly inapposite under Minnesota law, and the Court declines to deviate from the principles enunciated in Lewis.

Next, plaintiffs contend that the judicial privilege does not apply because defendants did not seriously and in good faith contemplate litigation. In his order continuing the summary judgment proceeding, Judge Davis stated:

> What is not clear, however, is whether such proceeding is, or was, contemplated in good faith. This issue cannot yet be determined however, for the litigation referred to in the Letter has not yet been commenced, nor have defendants provided any factual basis for the allegations against plaintiffs with which the court can review to determine if such litigation was, or is, contemplated in good faith.

Order, Feb. 7, 1994 at 5. Plaintiffs contend that defendants had no factual basis to support the claims in the letter. Moreover, plaintiffs contend that Shoeberg made virtually no effort to investigate the claims made in the letter.

Certainly, Shoeberg did not do the investigation necessary prior to commencing an action. See Minn. R. Civ.P. 11. Moreover, there is serious doubt as to whether the claims in the letter could be substantiated by further

investigation. However, defendants did not represent that they had done an investigation adequate to form the basis of a lawsuit. The letter indicates that only "a preliminary investigation" had been conducted and that a lawsuit would not be commenced until a full retainer had been paid. Finally, the letter was clearly a solicitation for additional clients. It is unrealistic to expect an attorney to invest substantial time a resources into a lawsuit which may never be filed.

However, it is not necessary that defendants show that the claims in the letter were meritorious, only that there was serious contemplation of litigation.[7] There is substantial evidence in the file that defendants did, in fact, intend to file a suit against plaintiffs. Shoeberg did conduct a preliminary investigation into his client's allegation. Additionally, he sent retainer agreements to former shareholders of Ronde corporation which, if returned, would have created an obligation on his part to file a lawsuit.

---

[7]At least three California cases have held that a communication "not related to a potential judicial action contemplated for legitimate purposes is not protected: by the judicial privilege." Herzog v A Co., Inc. 188 Cal Rptr. 155, 158 (Cal. App. 4 Dist. 1982); see Rubin v. Green, 5 Cal. Rptr. 2d 331, 337 (Cal. App. 4 Dist. 1992); Fuhrman v. California Satellite Sys., 231 Cal. Rptr. 113, 119 (Cal.App. 3 Dist. 1986). These cases dealt with a much broader statutory privilege contained in Cal. Civ. code Sec. 47, subd. 2. That statute not only bars defamation actions for communications made in contemplation of litigation, it also bars any tort claim arising out of a publication, including defamation, abuse of process, tortious interference of business relationships, etc....

Plaintiffs contend that the fact that no lawsuit was filed is an especially good indication that defendants did not seriously consider litigation. However, by bringing this suit, plaintiffs effectively pre-empted any suit which might have been filed. Although Pederson could have hired another attorney once suit was filed against Shoeberg (thus, creating a conflict of interest), the fact that he didn't does not indicate that he did not seriously contemplate litigation at the time the letter was sent.

Next, plaintiffs contend that even if defendants seriously considered litigation against Mr. Kittler, there is no evidence that litigation was seriously considered against Mrs. Kittler. In support of this contention, plaintiffs point to the fact that the retainer agreement sent with the letter does not mention litigation against Mrs. Kittler as within the scope of the agreement. Additionally, plaintiffs suggest that Shoeberg had no basis to believe that she participated in the dissipation of trust assets.

Certainly, defendants had less information to base a lawsuit against Mrs. Kittler than against her husband. However, her employment with the trust as financial administrator combined with information that she was significantly involved with trust operations, provided a sufficient basis for defendants to conclude that litigation against her might be appropriate.

Plaintiffs argue that even if summary judgment is appropriate as to their claims against Shoeberg, it is not appropriate as to Pederson.[8] Pederson, they note, did not file an independent memorandum in support of his motion for summary judgment. Instead, he merely joined in Shoeberg's memorandum. Plaintiff's position would have merit if Pederson were seeking relief on an independent

---

[8]Plaintiffs base their complaint against Pederson solely on his participation in the publication of the letter.

theory. However, Pederson's theory of relief is based on the same privilege as is Shoeberg's.

The Restatement (Second) of Torts, Section 587 (1977) extends the same privilege accorded attorneys by Section 586 to parties. Section 587 provides:

> A party to a private litigation or a private prosecutor or defendant in a criminal prosecution is absolutely privileged to publish defamatory matter concerning another in communication preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding.

Comment (e) to Section 587 is identical to comment (e) of Section 586. Insofar as Pederson seeks relief based on the identical privilege as that proposed by Shoeberg, Pederson is not barred from relief by his failure to submit an independent memorandum of law. Although Pederson's motives for participating in the publication of the letter are, perhaps, more suspect than those of Shoeberg, there can be little doubt that he hoped to initiate legal proceedings against plaintiffs. Pederson retained an attorney and acquiesced in sending the letter. Accordingly, just as Shoeberg is protected by the absolute privilege, so is Pederson.

Since the Court has determined that the subject letter is protected by an absolute privilege, it need not reach the issue whether the letter is protected by a qualified privilege.[9]

---

[9]Plaintiffs have presented substantial facts demonstrating that there is a material issue of fact as to whether defendants published the letter from an improper

The Court's decision here is clearly supported by public policy concerns. Plaintiffs' suit is essentially a pre-emptive strike designed to prevent defendants from pursuing the underlying action by creating a conflict of interest between Pederson and his attorney. At least one California judge has commented on the dangers present in allowing such a result:

> In Pacific Gas & Electric Co., supra, the Supreme Court observed that what PG & E was really trying to achieve by barring Bear Stearns from participating in the lawsuit was "to abort the lawsuit by starving the litigant of funds." * * * If permitted, the court said, such a tactic "would defeat the purpose of assuring free access to the courts, and cause a flood of oppressive derivative litigation...."

---

motive.

The Court notes a logistical problem with any jury trial on the issue of malice. Since communications between Pederson and Shoeberg are subject to the attorney/client privilege, it would be nearly impossible to determine the extent to which each defendant participated in the publication of the letter. Contrary to plaintiffs' position, Judge Davis did not reject defendants' public policy arguments. Instead, Judge Davis determined that although the parties may not inquire into the communications between attorney and client, inquiry may be had into the facts underlying the matter. Insofar as knowledge of the underlying facts would not aid a jury in determining the extent to which each defendant participated in the publication of the letter, it is likely that Shoeberg (at least) would be unable to defend himself in a defamation action.

> Here it appears that Rubin is trying to create the same adverse economic impact on the plaintiffs in the underlying action by forcing them to the expense of discharging their present law firm and attempting to retain new counsel.

Rubin v. Green, 5 Cal. Rptr.2d 311, 350 (McKinster, A.J., dissenting) (citations omitted).[10]

Similarly, once this action was filed, Shoeberg could not serve as Pederson's attorney in the underlying action without a conflict of interest.

Finally, the Court notes that this action is not the proper vehicle to determine the merit or the lack thereof of defendants' claims against plaintiffs. By bringing this action, plaintiffs effectively obstructed the ability of defendants to have their claims against plaintiffs heard by a Court of proper jurisdiction. This is exactly the result the judicial privilege was designed to prevent.

---

[10]In Rubin, the majority determined that an unlawful solicitation letter was not protected by California's broad statutory judicial privilege, since the conduct of unlawful solicitation could be separated from the communication of the solicitation.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTR

J. Patrick Kittler and
Linda Alt Kittler,

Plaintiffs

vs. **ORDER**
File No. MC-93-5920

Eckberg, Lammers,
Briggs, Wolff & Vierling;
Kevin K. Shoeberg, Esq,
and Jon Pederson, individually,

Defendants.

The above-entitled matter came on for hearing before the Honorable Michael J. Davis, Judge of District Court, on November 17, 1993, upon cross motions of the parties.

Robert J. Tansey, Jr., Esq., and Matthew L. Woods, Esq., appeared for and on behalf of Plaintiff.

Richard J. Thomas, Esq., appeared for and on behalf of Defendants Eckberg, Lammers, Briggs, Wolff & Vierling and Kevin K. Shoeberg, Esq.

Terrence J. Fleming, Esq., and Jonathan Saffold, Jr., Esq., appeared for and on behalf of Defendant Jon Pederson.

Based upon all the files, records, and proceedings herein, together with arguments of counsel, and the Court being duly advised in the premises,

IT IS HEREBY ORDERED:

1. That Plaintiff's motion for a continuance is granted and Defendant's motion for a Judgment is continued until completion of discovery regarding the factual basis of the February 26, 1993 letter.

2. That Defendants Kevin Shoeberg and Jon Pederson are compelled to attend depositions, and respond to certain questions regarding the factual basis for his defense to this action and the circumstances surrounding the mailing of the February 26, 1993 letter. Such depositions shall be taken within thirty (30) days from the date of this order.

3. That Defendants shall respond to Plaintiff's First Set of interrogatories and First Request for Production of documents within fourteen (14) days from the date of this order.

4. That Plaintiff's motion for costs and attorney's fees is denied.

5. That the attached Memorandum is incorporated herein by this reference.

Dated: _____, 1994

BY THE COURT

_____

Michael J. Davis
Judge of District Court

MEMORANDUM

FACTS

Plaintiffs brought this action claiming they were defamed by defendants Jon Pederson, and attorney Kevin Shoeberg, through a letter and retainer agreement which Mr. Shoeberg mailed to prospective clients in contemplation of commencing an action against plaintiffs.

The letter, dated February 26, 1993, was sent to former shareholders of Ronde Corporation/First Merchants Corporation (the "Letter"). The basis of plaintiff's claim is included in the first paragraph of the Letter which reads:

> I am writing this letter at the request of various former shareholders of the Ronde Corporation and First Merchants Corporation. I have been contacted by Jon Pederson regarding the possibility of bringing an action against Pat Kittler and his wife, for, among other things, theft of corporate property, fraud and misrepresentation, and breach of fiduciary duty as an officer. We have only done a preliminary investigation. It appears that the Minnesota Trade Trust which was an asset of the Ronde Corporation/First Merchants Corporation has become the asset of Patrick Kittler and his wife. It is our understanding that the Ronde Corporation/First Merchants Corporation initially created the Minnesota Trade Trust and was the beneficial owner of the trust.

No action against the plaintiffs herein has been commenced. On April 23, 1993 plaintiffs commenced the present action. Other than the information contained in the Letter, defendants have failed to provide a further factual

basis for the allegations referred to therein claiming they are precluded by the attorney/client privilege to provide such information.

Defendant's now move for summary judgment on the basis the statements contained in the Letter are absolutely privileged, qualifiedly privileged and there is no evidence of malice, no defamatory statements of fact were made and that public policy prevents a suit where the nature of the litigation would force an attorney to disclose information protected by the attorney/client privilege.

STANDARD

Summary judgement is appropriate where no issue of material fact exists and one party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. The moving party has the burden of showing there is no genuine issue of material fact and that it is entitled to summary judgment as a matter of law. Sauter v. Sauter, 244 Minn. 482, 70 N.W.2d 351 (1955). The nonmoving party has the benefit of that view of the evidence most favorable to it. Id.

The party opposing the motion must counter the depositions or affidavits with "sufficient specific facts to raise a jury issue." Lundgren v. Eustermann, 370 N.W.2d 877 (Minn. 1985) (citations omitted). To oppose successfully a motion for summary judgment, a party cannot rely upon mere general statements of fact, but rather must demonstrate at the time the motion is made that specific facts are in existence which create a genuine issue for trial. Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W. 2d 853, 855 (Minn, 1986).

PRIVILEGE IN DEFAMATION LAW

In the law of defamation, one is liable for an unprivileged communication of publication of false and

defamatory matter which injures the reputation of another. Matthis v. Kennedy, 243 Minn. 219, 67 N.W.2d 413, 416 (1955). Privilege is divided in two general categories, absolute and qualified. Absolute privilege means no liability will attach for intentionally false statements, coupled with malice, while a qualified privilege grants immunity only if the statements are publicized in good faith and without malice. Id. The question has arisen in this case as to which, if any, privilege applies.

Defendants argue statements contained in the Letter are protected by the absolute privilege pursuant to Matthis. Plaintiffs argue the statements contained in the Letter are not privileged because the statements were made outside the context of a judicial proceeding, therefore the privilege does not apply, pursuant to Nixon M. Dispatch Printing Co., 101 Minn. 309, 112 N.W. 258 (1907).

In Nixon, defendant newspaper published an article which contained extracts from a complaint on file in a divorce action. Nixon, 101 Minn. 309, 112 N.W. 258. The complaint had been filed with the court, but had never been presented to the court for its action. Id. at 259. The defendants asserted privilege pursuant to Rev. Law 1905, § 4920, which addressed absolute judicial privilege for reporters, editors, publisher or proprietor for a newspaper.

In Matthis the court addressed the absolute privilege of statements made "'in office' in the character of judge, juror, witness, litigant, or counsel-in the performance of the public duty or in the exercise of the private right upon which the immunity is based." Matthis, at 417 (citations omitted). In discussing the scope of the absolute privilege, the court adopted the rule set out in Restatement, Torts, § 586 (1938) which provides:

> An attorney at law is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as apart of a judicial proceeding in which he participates as counsel, if it has some relation thereto.

Comment (e) of Section 586 of the Restatement (Second) of Torts provides:

> As to communications preliminary to a proposed judicial proceeding the rule stated in this Section applies only when the communication has some relation to a proceeding that is contemplated in good faith and under serious consideration. The bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered.

The public policy addressed in Matthis is that of "securing to officers of the court the utmost freedom in their efforts to secure justice for their clients." Comment (a) of the Restatement (Second) of Torts § 586. As Nixon involved a newspapers right to publish information regarding judicial proceedings. Because in this case, the alleged defamatory statement was made by counsel to potential clients regarding potential litigation, Matthis is the controlling law in this case.

In Pinto v. Internationale Set, Inc. 650 F. Supp. 306 (D. Minn. 1986), the court held that a letter written by counsel informing a party, and that party's new employer that litigation for damages would be instituted against them for fraud, misrepresentation and other claims was absolutely privileged against a subsequent claim for defamation. The court, applying Minnesota law

and the Restatement (Second) of Torts §586 and §587, held the absolute privilege extends to statements made prior to the institution of litigation, if the statement has some connection or logical relation to the action, achieves the objects of litigation and involves litigants. Pinto at 308.

Based on the above, the letter written by Kevin Shoeberg may be protected by the absolute privilege. The Letter notifies potential clients of allegations that would affect their rights as former shareholders of the Ronde Corporation/First merchant Corporation, if the allegations were proven. Therefore, the Letter has some connection or logical relation to a proceeding. What is not clear, however, is whether such proceeding is, or was, contemplated in good faith. This issue cannot yet be determined, however, for the litigation referred to in the Letter has not yet been commenced, nor have defendants provided any factual basis for the allegations against plaintiffs with which the court can review to determine if such litigation was, or is, contemplated in good faith.

Defendants argue they are prevented from providing the factual basis for such allegations because of the attorney/client privilege. In Upjohn Co. v. United States, 449 U.S. 383, 390-391 (1981) the United States Supreme Court held that the attorney/client privilege protects disclosure of communications, it does not protect disclosure of underlying facts. See also, Sedco Int'l. S.A. v. Cory, 683 P. 2d 1201, 1205 (1982) (The attorney/client privilege does not protect facts communicated to an attorney).

In the Letter, Mr. Shoeberg refers to allegations against plaintiffs of theft, fraud, misrepresentation and breach of fiduciary duty with regard to an entity called the Minnesota Trade Trust. The former shareholders had to have obtained facts which led them to believe plaintiffs engaged in such activities. Because such facts were later

communicated to an attorney does not prevent disclosure. If defendants had brought litigation concerning the allegations of theft, etc., the factual basis would have to be proffered to prove their claims. Accordingly, defendants must provide such factual basis to allow the court to determine whether litigation was, or is, contemplated in good faith.

Defendants argue they are entitled to summary judgment as the Letter is also protected by a qualified privilege, and that there is no evidence of malice. To show malice, plaintiff must prove defendants acted with ill will and for an improper motive or carelessly or wantonly for the purpose of injuring plaintiff. Stuempges v. Parke-Davis & Co., 297 N.W.2d 252 (Minn. 1980). As plaintiffs have been prevented to determine the factual basis, if any, for the allegations, the court cannot rule on the qualified privilege.

Accordingly, plaintiff's motion for a continuance pursuant to Minn.R.Civ.P. 56.06 is granted and defendants shall be compelled to provide the factual basis for the allegations contained in the Letter.

CONSTITUTIONAL PROTECTION FOR EXPRESSIONS OF 'OPINION'

Finally, defendants argue they are entitled to summary judgment on the basis that the statements contained in the Letter are not defamatory by law because they are not statements of fact. In support of this argument, defendants cite Capan v. Daugherty, 402 N.W.2d 561 (Minn. Ct. App. 1987). In Capan, the court relies on the United States Supreme Court opinion in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40.(1974) for the proposition that opinion is absolutely protected under the First Amendment. Capan at 563. The court then adopted the multi-factor test recently adopted by the Eighth

Circuit for determining whether a remark is mere opinion protected by the First Amendment . Id.,citing Janklow v. Newsweek, Inc. 788 F.2d 1300 (8th Cir. 1986). Based on these cases, defendants assert the use of cautionary language such as "maybe" or "it makes me think" alerts the reader that the statement is likely opinion. Therefore, as Mr. Shoeberg prefaced the allegations with the words "possibility of bringing charges" the reader is alerted that the statements are opinion, not fact.

In Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) the Court addressed the issue of opinion in the context of defamation law. The Court rejected the contention that the First Amendment requires an inquiry into whether statements are opinion or fact and the multi-factor tests developed to make such determination. Milkovich at 19. The court held "the 'breathing space' which 'freedoms of expression require in order to survive' is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and 'fact'". Id. (citations omitted). Because expressions of opinion may contain or infer assertions of objective fact, the Court held only opinions relating to matters of public concern and are incapable of being proven true or false, and statements that cannot be reasonably interpreted as stating facts are constitutionally protected. Id. at 20.

The Minnesota courts have construed Milkovich as narrowing, but not eliminating, constitutional protection for expressions of opinion. See, Hunt v. University of Minnesota, 465 N.W.2d 88 (Minn. Ct. App. 1991); Lund v. Chicago and Northwestern Transp.,467 N.W.2d 366 (Minn. Ct. App. 1991). In Lund, the court held that opinion-fact determination is a question of law. Id. at 369. In making such determination, the court stated that although the
multi-factor test of Janklow is not binding, it is helpful.

In Weissman v. Sri Lanka Curry House, Inc., 469 N.W.2d 471 Minn. Ct. App. 1981), the court held that private defamation actions must be analyzed under Minnesota common law. This holding is based on the fact that the Supreme Court has not extended constitutional protection for public speech to private speech and because in Milkovich the Court rejected a separate constitutional privilege for expressions of opinion. Weissman, at 473. The court determined that Minnesota common law does not distinguish between fact and opinion. Id. "Epithets or adjectives can constitute defamation if they imply a specific type of reprehensible conduct." Id. (citations omitted). Under this analysis, stating someone is "dishonest" is actionable, as it implies the commission of specific acts of dishonesty. Id.

Under this analysis, the statements contained in the Letter are actionable. They imply specific acts of wrongdoing, that are verifiable. Therefore, defendants are not entitled to summary judgment on the basis the statements in the Letter were protected opinion.

M.J.D.

J. Patrick Kittler
999 County Road 19, Maple Plain, Minnesota 55359

October 19,1995

Hon. A. M. Keith, Chief Justice
Supreme Court
25 Constitution Avenue
Saint Paul, Minnesota 55155

Dear Justice Keith;

My wife, Linda and I received your ORDER denying our petition for further review of Kittler vs Eckberg, et al. and Pederson yesterday. I am a Stanford Law School graduate. I practiced for twenty years and have served our community in many capacities, including a term on the Board of Governors of the State Bar. It is difficult to imagine the basis for denial of our petition. The case meets every test for review. It raises issues of due process and equal protection and issues of particular importance to judicial administration, to commerce, and to the public. The case offers the Court an opportunity to establish needed standards of conduct and accountability in a troublesome area of attorney activity. The facts are clear.

A lawyer with a client wrote a letter to 56 shareholders of a company of which I had been an officer. He said that Mrs. Kittler and I were guilty of theft, fraud and misrepresentation, and breach of duty as an officer. Mrs. Kittler never had any connection with the company. The lawyer did not say he intended to sue Mrs. Kittler. He requested a cash fee plus future expenses and additional contingent fees to sue me. The retainer required action by a defunct corporation and did not disclose that the lawyer held a judgement in fraud against his informant/client. He declined representation until at least $5,000.00 was

received. This amount was never received. The case was never filed. Six weeks later we sued for defamation. The trial court found that, "...there is serious doubt as to whether the claims in the letter could be substantiated... (and) ... that there is a material issue of fact as to whether the defendants' published the letter from an improper motive...".

We believe that attorneys should be held to at least the same standard as every other citizen when soliciting business, namely the truth. Contrary to the opinion of the Appellate Court that we offer no support for this view, we offered at least seven cases dealing directly with the requirement of truth by an attorney in solicitation. There are many more. The cases cited thoughtfully analyze the issues and cite the body of law concerning the subject. They, and the cases they rely upon, strongly support our view of the law.

If slanderous letters of solicitation are to be accorded judicial (contrary to the above) immunity and therefore no accountability for the damage they inflict, the common law requires that there has to be not only a serious, but a good faith intention to bring a law suit. How can this test be met where the solicitation is written without appropriate due diligence or proper motive?

The defendants claimed immunity under the judicial action privilege to defame and twice moved for summary judgement. The trial court rulings contradict each other on the issues of good faith and attorney client privilege.

> Judge Davis said that a letter of solicitation must be supported by facts without reliance on attorney/client communications. These facts must show that a judicial proceeding is both contemplated in good faith and under serious consideration. He gave the defendants an opportunity to produce them. They did not. They brought a second motion.

> Judge Lange said the letter of solicitation justified itself. He said there was no duty to know the truth. He said that, "It is unrealistic to expect an attorney to invest substantial time and resources into a lawsuit that may never be filed." This ruled out any requirement that the attorney independently establish the truth or that he have any more intention to file a law suit than it takes to solicit a fee.

How could anyone believe that with this set of facts these defendants could have responsibly, seriously and in good faith intended to sue my wife and me?

The Appellate Court departed from the overwhelming weight of authority to support Judge Lange. It relied upon a single California decision that did not even discuss defamation. It ignored the decisions from other states, the Federal Circuits and the U. S. Supreme Court dealing with truth in solicitation. These compel truth, deny the right to solicit where there is danger of defamation, deny the privilege where solicitation occurs and deny attorneys the right to attract clients by publishing defamatory claims. In all of these cases the attorney had a client. In most of them litigation was in process. None grant a privilege to defame in solicitation. None treat solicitation standing alone as part of the judicial process.

The courts below glossed over the rights of Linda Kittler. Please tell me. How can the libel of someone you do not intend to sue be accorded the judicial privilege?

Unless the decision below is reversed or given careful review and thoughtful support, Minnesota will stand alone. It will stand for the blatant and appalling proposition that in soliciting business for themselves, lawyers, unlike any other citizen, may destroy businesses and reputations whenever it seems profitable, and without truth or accountability to those they damage.

Our personal fortune has been destroyed and our reputations have been irreparably damaged. A unique finance company, involving 225 investors and several millions of dollars, which brought otherwise unavailable financing to some 60 young businesses employing several hundred people in the State of Minnesota, has gone down and may never revive. There has been a suicide and a heart attack. The aftermath of this letter of solicitation has reached into twenty-one states, caused several meritless lawsuits, with more to come, and generated a federal investigation. The Supreme Court may believe that there are good reasons to burden commerce and the private citizens of all States within the reach of Minnesota lawyers with this exclusive privilege to gain personal profit. If so, those who were injured and the public deserve to know those reasons. I respectfully request that the Court reconsider and grant our petition for further review.

Sincerely yours,

STATE OF MINNESOTA
IN SUPREME COURT

Appellate Court Case
C8-95-462

Court of Appeals Decision Filed: 8/8/95

PETITION FOR REVIEW OF DECISION OF THE COURT OF APPEALS

J. PATRICK KITTLER and
LINDA ALT KITTLER,

Appellants/Plaintiffs,

v.

ECKBERG LAMMERS BRIGGS WOLFF & VIERLING;
KEVIN K. SHOEBERG, ESQ.; and
JON PEDERSON, individually,

Respondents/Defendants.

TO: The Supreme Court of the State of Minnesota

The petitioners, J. PATRICK KITTLER, and LINDA ALT KITTLER, pursuant to Rule 117 of the Minnesota Rules of Appellate Procedure, request Supreme Court review of the above-entitled decision of the Court of Appeals upon the following grounds.

Respectfully submitted,
HVASS WEISMAN & KING
CHARTERED

DATED: BY S/_____
Richard A. Williams, Jr. 117559
Suite 450, 100 So. 5th Street
Minneapolis, MN 55402
612-333-0201
ATTORNEYS FOR
PLAINTIFFS/APPELLANTS

PROOF OF SERVICE

Copies to:
Bryan G. Ascheman
GERAGHTY O'LOUGHLIN & KENNEY
1400 Capital Centre
386 North Wabasha St.
St. Paul., MN 55102

CLIENTS:
Kevin K. Shoeberg &
Eckberg Lammers etal

Jonathan Saffold, Jr.
LINDQUIST & VENNUM
4200 IDS Center
80 South Eighth St.
Minneapolis, MN 55402

CLIENT:
Jon Pederson

The undersigned certifies that the PETITION FOR REVIEW OF DECISION OF COURT OF APPEALS was served upon all parties to the above cause, to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on the ___ day of September, 1995.

___U.S. Mail ___Fax ___Federal Express ___Express Mail _X_Messenger

_____
Cindy L. Tewalt

Subscribed and sworn to before
me this _7th_ day of September, 1995.

_____
Notary Public

A. Statement of legal issues and resolution by the Court of Appeals.

1. Does any privilege attach to a per se libelous false statement made by an attorney in a letter sent solely to solicit litigation clients and money for a fee?

The Court of Appeals ruled in the affirmative holding:

a. Such per se defamatory statement made by a lawyer in a letter of solicitation is preliminary to a proposed judicial proceeding;

b. The letter of solicitation alone is sufficient to show that the litigation was both seriously intended and contemplated in good faith;

c. That this privilege precludes a non-party who is defamed by the lawyer from seeking any relief for the false statements;

d. There is no difference between a letter sent by a lawyer preliminary to a proposed judicial proceeding and a letter sent by a lawyer soliciting potential plaintiffs and money to commence a lawsuit.

2. Is a lawyer "participating as counsel" with respect to proposed litigation prior to the time that he accepts representation for purposes of litigation?

The Court of Appeals answered in the affirmative.

3. Can defamatory statements made by a client in a letter seeking to solicit participation in a lawsuit become privileged if made by a lawyer for the same purpose?

The Court of Appeals answered in the affirmative.

4. Does a client waive the attorney/client privilege by requesting an attorney publish such per se defamatory statements concerning another in a letter of solicitation?

The Court of Appeals answered in the negative.

5. Does the attorney/client privilege prevent a lawyer from providing the factual basis for the per se defamatory allegations in a letter of solicitation?

The Court of Appeals answered in the affirmative.

6. Does public policy favor the extension of the judicial privilege to per se libelous statements made in a communication, the sole purpose of which is to solicit clients or money for litigation?

The Court of Appeals held that it does.

B. Statement of criteria to support petition for review.

1. The questions presented are important ones upon which the Supreme Court should rule because of their importance to the administration of the courts, the professional conduct of the practicing Bar, and the impact on the public.

2. The rules announced by the Court of Appeals involve interpretation of the Minnesota Code of Professional Responsibility Rule 7.1, 7.2, and.7.3 in a way which are inconsistent with prior rulings of the Minnesota Supreme Court.

3. The decision so departs from the accepted rules concerning solicitation at any stage of a judicial proceeding so as to call for exercise of the Supreme Court's supervision in the creation of a uniform rule of law.

4. The decision of the Supreme Court is necessary to establish the law in a narrow but critical set of facts arising for the first time in this state but concerning a frequently recurring statewide activity - the drafting of communications soliciting litigation.

5. The decision requires a development and application of new principles of Minnesota law based upon policies relating to Constitutional jurisprudence and judicial administration.

C. Statement of the case.

This appeal arises out of an action brought by petitioners against respondents Kevin Shoeberg, an attorney, his law firm, and Jon Pederson, Mr. Shoeberg's client. The claim arose out of false per se defamatory allegations made by attorney Shoeberg regarding both petitioners in an acknowledged letter of solicitation (App.P.18-19) sent by attorney Shoeberg in an effort to

induce other individuals to be plaintiffs and to contribute money to a fund for purposes of commencing a lawsuit. The accompanying proposed retainer did not seek authority for an action against petitioner Linda Alt Kittler. Five weeks passed after the letter of solicitation was sent without litigation being commenced against petitioners. They then brought the action below against respondents.

Respondents twice moved for summary judgment in the court below. The Honorable Michael Davis denied the first motion for summary judgment holding that Minnesota law made no distinction between statements of opinion and statements of fact and that, in any event, statements made in the letter were verifiable and, hence actionable if not subject to a privilege. He did not rule on the issue of any applicable privilege because discovery was not completed.

Respondents renewed their motion after discovery asserting the statements, even if false, were subject to an absolute privilege pursuant to the doctrine of judicial action privilege associated with statements made prior to and in the course of litigation. The Honorable Stephen Lange found that although the statements were probably false and, notwithstanding the fact that there had been no significant investigation of the truth or falsity of the statements by attorney Shoeberg prior to sending the letter of solicitation, they were protected under the judicial action privilege and, thus, not actionable. The Court of Appeals affirmed this ruling.

D. Argument in support of the petition.

1. **The ruling of the court below places the Judicial imprimatur upon untruthful statements made by lawyers in the context of commercial speech - a right enjoyed by no other citizen.** In 1976, the U.S. Supreme Court recognized that commercial speech was protected by the First Amendment to the U.S. Constitution. Virginia Board of Pharmacy v. Virginia Consumers Council, Inc., 425 U.S. 748 (1976). One year later, it extended the

protection of First Amendment commercial speech to lawyer solicitations. Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Commercial free speech, however, in order to be protected by the First Amendment, had to be truthful. Bates, 433 U.S. at 383; Ohralik v. Ohio State Bar Assoc.. 436 U.S. 447, 462 (1978). This Court, in 1981 following the Bates decision, held that correspondence and advertisements, if they did not contain false, misleading, or deceptive statements, were protected as commercial free speech. In re: Appert & Pyle, 315 N.W.2d 204(Minn. 1981).

In this case, the offending document is an admitted letter of solicitation. It was sent to individuals who were not parties to the action solely to induce them to become parties to the action and to contribute money to litigation. The letter by its very terms indicated that there would be no action brought unless certain minimum amounts of money were raised by this solicitation. This solicitation contained allegations which the court below recognized were probably not truthful and could not be proved to be true.

The Court of Appeals ruled, as a matter of law, that an untrue statement made by a lawyer in a commercial solicitation is not actionable even though if made by any other citizen in any other occupation it would be. This ruling was made notwithstanding the clear mandate of both the Minnesota and the U.S. Supreme Courts that lawyer solicitation is protected speech only if it is truthful. The bad policy is apparent. Lawyers exercising First Amendment commercial free speech are not held to the same standard of truth by the Court as the rest of the population. The rationale of the Court of Appeals in so holding was that a letter of solicitation of the type in this case is subject to the judicial privilege. An examination of the judicial privilege makes clear that this holding is misplaced.

2. **The Court of Appeals has given lawyers greater First Amendment rights than other citizens.** The judicial action privilege is designed to accord to pre-litigation and litigation communications an absolute privilege in order to advance the ability of people to litigate their claims free from possible exposure to defamation claims. This privilege exists, however, only when a lawyer is acting as a lawyer. See, Mathis v. Kennedy, 67 N.W.2d 413 (Minn. 1954). Solicitation prior to the pendency of litigation is outside of the context of a judicial action. See, Gold v. Intersoft Corp., 49 N.Y.S.2d 660, 128 N.Y.M. 198 (1985). Logic dictates such a result. The judicial action privilege was never contemplated to apply to solicitation. The privilege developed in the common law at a time when solicitation by lawyers was prohibited. Thus, when Mathis v. Kennedy was decided by this Court in 1954 and it held that the privilege exists only when a lawyer is acting as a lawyer, the privilege did not apply to solicitation since a lawyer could not act as a lawyer and solicit - such activity was prohibited. The Appeals Court decision creates the paradox of permitting a lawyer, by virtue of his "office," to do what his "office" would otherwise prohibit him from doing -solicit. The lawyer's right to solicit arises as an ordinary citizen under the Constitution of the United States. This paradox, unsurprisingly, produces the contradictory result that a lawyer, unlike any other citizen, may be untruthful in commercial speech even though the lawyer's right to commercial speech flows from the same source as any other citizen.

It also creates the anomalous result that respondent Pederson, by the mere expedient of hiring a lawyer to write the letter on his behalf, is now along with his lawyer immune from any consequences for untruthful statements. Thus, the ruling has extended the judicial privilege to the speech of the client. Finally, the ruling precludes Linda Alt Kittler, who was never a target of any proposed litigation, from seeking recovery for defamatory statements

made about her. So now we have a nonparty who is defamed by a letter of solicitation sent by a lawyer being precluded by judicial privilege from bringing an action against that lawyer even though the statement could under no circumstances have been a predicate to litigation against that party and made no pretenses to be.

3. **A solicitation is not a communication preliminary to a proposed judicial proceeding.** The Court of Appeals, at P.7 of its opinion (App.P.7) makes the statement "Appellants offer no support for their view that a letter soliciting potential plaintiffs in a communication preliminary to a proposed judicial proceeding are mutually exclusive." That statement does not accurately reflect the arguments made by appellants or the materials contained in their brief. Attached in the appendix are pages 11-13 of appellants' initial brief (App.P.45-47) and pages 1-7 of appellants' reply brief (App.P.48-55). These demonstrate that appellants did supply support for this distinction. The holding in Reuben v. Green, 4 Cal.4th 1187, 17 Cal.Rptr.2d 828 (Cal. 1993) was explained and placed in context. (App.P.49-53).

The rationale of this Court in Mathis v Kennedy, was pointed out:

> The recognized classifications where the publication of defamatory material is absolutely privileged is confined within narrow limits ... any publication made whether oral or in writing must be made 'in office' and the character of judge, juror, witness, litigant or in the performance of public duty or in the exercise of the private right upon which the immunity

is based." Mathis v. Kennedy, 67N.W.2d at 417. (App.P.51-52).

Thirdly, petitioners pointed out to the Court of Appeals that solicitations, even after litigation has been commenced, have always been treated differently from any other communications. McKenna v. Champion Int'l Corp., 747 F.2d 1211 (8th Cir. 1984). See PP.12 and 13 of appellants' brief (App.P.46-47). Solicitation of clients in class actions pursuant to Rule 23 has always been subject to the supervision of the court to ensure that no misleading or untruthful statements are made in communications going to class members. This is true regardless of whether it is an opt out or an opt in class action. See, in this regard, McKenna, supra, and the cases cited therein (some of the cases directly address risk of defamation). This Court must review a decision by the Court of Appeals which insulates lawyer-citizens from the consequences of making untruthful statements under circumstances where non-lawyer-citizens are not accorded that protection.

For these reasons, the petitioners seek an order granting review of the decision of the Court of Appeals.

STATE OF MINNESOTA
IN COURT OF APPEALS

CB-95-462
Appeal from Judgment

J. PATRICK KITTLER and
LINDA ALT KITTLER,

Appellants/Plaintiffs,

v.

ECKBERG LAMMERS BRIGGS
WOLFF & VIERLING;
KEVIN K. SHOEBERG, ESQ.; and
JON PEDERSON, individually,

Respondents/Defendants.

APPELLANTS' BRIEF

Richard A. Williams, Jr. 117559
HVASS WEISMAN & KING CHARTERED
Suite 450, 100 So. 5th Street
Minneapolis, MN 55402
612-333-0201
ATTORNEYS FOR APPELLANTS

Richard J. Thomas 137327
GERAGHTY O'LOUGHLIN & KENNEY
1400 Capital Centre
386 North Wabasha St.

St. Paul, MN 55102
612-291-1177
ATTORNEY FOR RESPONDENTS
ECKBERG LAMMERS BRIGGS WOLFF VIERLING
AND SHOEBERG

Jonathan Saffold, Jr.231526
LINDQUIST & VENNUM
4200 IDS Center
80 South Eighth St.
Minneapolis, MN 55402
6121-371-3211
ATTORNEYS FOR RESPONDENT PEDERSON

ARGUMENT

Summary Introduction.

The letter in the instant case is a letter of solicitation. Every court which has addressed letters of solicitation sent by attorneys has held that statements in those letters must be truthful. Bates v. State Bar of Arizona, 433 U.S. 350 (1977); In re Appert and Pyle, 315 N.W.2d 204 (Minn. 1982); Cf., Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978); Virginia Board of Pharmacy v. Virginia Consumers Council, Inc., 425 U.S. 748 at 753, n.25 (1976). It makes no difference whether the letter is sent before or during litigation. If it is a solicitation, it may not contain false or misleading statements. McKenna v. Champion International Corporation, 747 F.2d 1211 (8th Cir. 1984). This was because of concern by the courts about potential defamation, among other evils, if the letters were not truthful. Bates, supra., at 383; In re Premus, 436 U.S. 412 at 415, 98 S.Ct. 1893 (1978); Appert, supra.

From the foregoing, it follows, a fortiori, as a matter of law, that where truthfulness is required by the courts, no privilege can attach to an untruthful statement. Letters of solicitation are permitted because they are commercial speech protected by the First Amendment. Bates, supra. A letter of solicitation is not, as a matter of law, judicial action but a statement for the pecuniary interest of the lawyer: hence, not subject to the privilege associated with judicial action.

The reason we are here is that the Court below arrived at its conclusion based upon analysis of this privilege which does not exist in the instant case.

A.All Courts that have addressed letters of solicitation sent by lawyers have held that such letters must be free of any false or misleading statements.

Prior to 1976, commercial speech had the same non-favored status as obscenity and fighting words. That year a case brought by a citizens group to prevent newspaper advertising of drug prices reached the U.S. Supreme Court. Virginia Board of Pharmacy v. Virginia Citizens Consumers Council, Inc., supra. That Court invalidated a state statute prohibiting pharmacists from advertising the cost of prescription drugs. The Court recognized that commercial speech was protected by the First Amendment to the U.S. Constitution. The Court in doing so, however, ruled that regulations may exist to ensure truthfulness of expression and expressed special concern about lawyers and other professions. The Court said:

We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render services of almost infinite variety and nature, with the consequent enhanced possibility

for confusion and deception if they were to undertake certain kinds of advertising, 425 U.S. 748 at 733, n.25.

One year later, the U.S. Supreme Court addressed the issue of lawyers and lawyer advertising. In Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the Supreme Court, for the first time, established the right of lawyers to solicit saying that it was protected commercial speech under the First Amendment. However, it was clear that the note in Virginia, cited above, foreshadowed the Court's concerns. Because, in Bates, the Court made absolutely clear that if the advertising is false, deceptive, or misleading, it was clearly subject to regulation. Bates at 383.

Again, the following year, the Supreme Court made even more clear that a lawyer's solicitation must be absolutely truthful. In Ohralik v. Ohio State Bar Assoc., 436 U.S. 447 (1978), the Court held that a lawyer, when soliciting a fee, enjoyed only the commercial speech freedom of the First Amendment. The Court went on to point out that the possibility of fraud, undue influence, intimidation, over-reaching, and other forms of vexatious conduct was so great that this type of solicitation could be prohibited without proof of actual wrongdoing. Id. at 462.

In 1980, the State of Minnesota amended its disciplinary rules to conform with Bates and Ohralik. Minnesota Code of Professional Responsibility, DR2-101(A), DR2-103(A) and DR2-104(D). These changes are currently incorporated in Rules 7.1, 7.2, and 7.3 of the Rules of Professional Conduct.

Shortly thereafter, the Minnesota Supreme Court had its first opportunity to address the issue of lawyer solicitation. The Minnesota Court was presented with a situation in which two lawyers had solicited clients to pursue an action against a pharmaceutical manufacturer. The Minnesota Court, following the Bates decision, held that the correspondence and advertisements, since they did not contain false, misleading, or deceptive statements, were protected as commercial free speech. In re Appert & Pyle, 315 N.W.2d 204 (Minn. 1981). The next year, the U.S. Supreme Court summarized the commercial free speech doctrine in the context of advertising for professional services as follows: "Truthful advertising for professional services is entitled to the protection of the First Amendment." In re R.M.J., 455 U.S. 191, 102 S.Ct. 929, 937 (1982).

B.Public policy requires that solicitation letters not contain false or misleading statements.

In analyzing public policy, it must be kept in mind that letters of solicitation were never permitted prior to Bates. The common law which applied to lawyers' communications did not address letters of solicitation because they did not exist. Bates changed that rule and provided that there was constitutional protection to lawyers' newspaper advertising. It defined that protection as being the same as any other form of commercial free speech.

This distinction is critical. Letters of solicitation and advertising are not judicial action. They are clearly commercial free speech. An examination of the cases

demonstrates the fact that the Court did not consider these letters to be judicial action but considered them to be purely cases involving exercise of First Amendment rights. The courts, in limiting that right, have set forth the associated policy considerations.

The U.S. Supreme Court has pointed out that a state may rightly fear that members of its bar have powers of persuasion not possessed by laymen. That such persuasion may be as potent in writing as it would be in person and may draw an unsophisticated layman into litigation contrary to that person's best interest. See, Ohralik v. Ohio State Bar Assoc., 436 U.S. 447, 464-467 (1973). The Minnesota Supreme Court has noted that direct solicitation involves a greater potential for abuse than advertising in part because it cannot be as easily ignored as advertising and would not be susceptible to effective enforcement guidelines issued by the state. Appert, supra at 215.

The U.S. and Minnesota Supreme Courts have held that a letter of solicitation may not be constitutionally prohibited. They have not, however, held that it is judicial action. A moment's thought will reveal why. If, in fact, a letter of solicitation had historically been deemed to be judicial action, it would not have been prohibited in the first instance.

Common sense dictates that a solicitation is not judicial action. The sole purpose for which a letter of solicitation is written has nothing to do with the judicial process. It has nothing to do with the role that a lawyer plays. A lawyer's solicitation of a client is not unique. It is no different than any other businessman's solicitation of a customer.

It was the policy considerations set forth above which had resulted in states prohibiting lawyers from engaging in solicitation prior to the Bates case. The Bates case is a narrow exception to what would otherwise have been prohibited conduct and under the Bates case, that narrow exception is subject to the solicitation being truthful and not misleading.

C. The judicial action privilege does not apply to a letter of solicitation.

It is a logical absurdity to assert that lawyers are only allowed to solicit if they tell the truth, but if they don't tell the truth, they are protected from the consequences of lying by the judicial policy privilege. Beyond being logically absurd, it leads to an absolutely untenable policy: namely, a policy prohibiting everyone except lawyers from telling lies in letters of solicitation.

This logical conundrum defines the error of the Court below in applying the judicial action privilege to untrue statements made in a letter of solicitation. Statements in a letter of solicitation must be truthful in order for the solicitation to be lawful. Statements made in the course of judicial action need not be truthful in order to be lawful. The Court analyzed the statements which must be true in the context of the judicial action exception which does not require truthfulness and, hence, cannot apply to a letter of solicitation. This becomes clear in analyzing the history of the judicial exception.

The policy considerations supporting the judicial action privilege are accorded to prelitigation and litigation communications by virtue of the fact that there is a public interest involved in advancing the ability of people to litigate their claims in the judicial process free from potential exposure to defamation claims. This basic truth has been recognized by the Supreme Court. Matthis v. Kennedy, 67 N.W.2d 413 (Minn. 1954).

The Court has pointed out that this privilege, where it exists, only applies when the lawyer is acting as a lawyer. The privilege arose in the common law at a time when solicitation was not permitted. The doctrine was developed in order to protect communications by lawyers to defendants or to others in the context of prosecuting or getting prepared to prosecute claims for clients the lawyer already had. It was never designed to, nor did it ever address, communications made by lawyers in an effort to obtain new clients. It could not. Such communications were prohibited. It is for this reason that the entire body of case law relied upon by respondents and which the Court below applied was inapposite to the instant dispute.

As appellants pointed out in their statement of case, this is a matter of first impression in the State of Minnesota. Although respondents asserted in their statement of the case that this issue had been previously addressed in Matthis v. Kennedy, supra, that is an inaccurate statement. The Matthis case was decided in 1954--23 years before Bates, supra, and over a quarter of a century before Appert, supra. It did not involve a solicitation letter since solicitation letters were prohibited at that time and Matthis merely outlines the judicial privilege that applies to communications which are not in the nature of solicitation.

This is the first time that a Minnesota court has had to deal with an allegedly untruthful statement contained in a letter of solicitation sent by a lawyer. The rule of law, however, is clear based upon Appert, supra. The Appert court, relying upon Bates and its progeny, held that solicitations were commercial free speech and could not be prohibited. However, the Minnesota Supreme Court in reaching that conclusion specifically relied upon an underlying finding that the solicitation involved was truthful and not misleading. The truthfulness of the solicitation is critical.

In McKenna v. Champion Int'l Corp., 747 F.2d 1211 (8th Cir. 1984), the Eighth Circuit Court of Appeals examined lawyer solicitation in light of Bates and its progeny. Its observations are particularly appropriate in the instant case.

... [D]irect mail solicitation of particular plaintiffs for a particular lawsuit closely approaches in-person solicitation. See, Baker v. Michie Co., 93 F.R.D. 494, 496 (W.D.Va. 1982). These communications from counsel 'are not subject to third party scrutiny and consequently are much more likely to approach (and occasionally cross) the dividing line between accurate representation and those that are false and misleading.'

747 F.2d at 1216. The McKenna Court also recognized the fact that where the attorney's activity involved solicitation of clients for purposes of pursuing litigation, that activity is motivated primarily by pecuniary gain. 747 F.2d at 1216.

The concerns of all the courts that have addressed this issue is the fear that in the course of solicitation false, misleading, or defamatory statements might be made. That is precisely what happened in the instant case.

Any other business person making a solicitation which contained defamatory statements would be held liable for such publication. There is absolutely no public policy nor any law which makes an attorney any less responsible for false statements in a solicitation.

The rule is that a lawyer who sends a letter of solicitation that contains untrue statements bears the same risk as any other person sending such a letter of solicitation; namely, that if the untrue statements defame and injure another, the lawyer is liable in an action for damages.

D.Material issues of fact exist that preclude granting of summary judgment.

1.Standard for Summary Judgment

Rule 56 of the Rules of Civil Procedure sets forth the standard required to grant summary judgment.

Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law.

Minn.R.Civ.P. 56.03. Thus, summary judgment may be granted only if, after taking the view of the evidence most favorable to the nonmoving party, "the movant has clearly sustained his burden of proving that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law." Vacura v. Haar's Equipment, Inc., 364 N.W.2d 387, 391 (Minn. 1986). Moreover, the role of the trial court in a motion for summary judgment is to determine if any genuine issues of material fact exist, not to determine how such issues should be decided. Hinrichs v. Farmers Cooperative Grain & Seed Association, 333 N.W.2d 639, 641 (Minn. 1983). All factual inferences are resolved against the moving party. Grondahl v. Bulluck, 318 N.W.2d 240 (1982); Wartnick v. Moss & Barnett, 490 N.W.2d 108 (1992); Fabio v. Bellamo, 504 N.W.2d 758 (1993); Koeller v. Nexus Residential Treatment Facility, 494 N.W.2d 914 (App. 1993), review denied. Therefore, summary judgments are to be granted with caution and only in the most appropriate circumstances. Lundgren v. Eusterman, 370 N.W.2d 877, 882 (Minn. 1985).

When reviewing the trial court's granting of a motion for summary judgment, this Court's review is de novo. See, General Casualty Co. of Wisconsin v. Mid-Continent Agencies, Inc., 485 N.W.2d 147 (Minn.App. 1992), review denied; Bankruptcy Estate of United Shipping Co., Inc. v. Tucker, 474 N.W.2d 835 (Minn. App. 1991), review denied.

2.In the present case, there is clearly a dispute as to material fact.

The allegations in the letter of solicitation were that appellants J. Patrick Kittler and Linda Alt Kittler were thieves. Judge Davis ruled that as a matter of law the allegations contained in the letter were subject to proof and, hence, actionable, if no privilege attached. App.P.38, Davis Memorandum. Judge Lange acknowledged the fact that the allegations made about the Kittlers in the letter of solicitation likely could not be proved. App.P.51.

These observations by the Court are certainly well grounded in the record. The Affidavit of J. Patrick Kittler (App.PP.57-60), the Affidavit of Linda Alt Kittler (App.P.126), together with the Memorandum Report sent to the shareholders of First Management, Inc. (App.PP.61-65), outline the actual events which occurred and clearly demonstrate that the allegations are false. Beyond that, the deposition testimony of SHOEBERG which incorporates statements made by PEDERSON in his deposition demonstrate that SHOEBERG had no facts upon which he could rely for the truth of the statements made in the letter of solicitation, particularly those involving theft, and PEDERSON, his client, denied making any statements involving theft by J. Patrick Kittler or by Linda Alt Kittler. App.PP.104-113.

To say that there is an issue of material fact is to give the benefit of doubt to the respondents in this case. The record, as it currently stands, is absolutely devoid of any evidence which would support the truth of the allegations of dishonesty made by respondents regarding appellants. The Court below was cognizant of this. Notwithstanding the fact that it applied the wrong legal analysis to the statements, it recognized that the level of investigation done by respondent SHOEBERG prior to making the defamatory statements in

the letter did not meet the level which was imposed upon an attorney pursuant to Rule 11 prior to commencing litigation. App.P.51. A persuasive argument can be made that based upon the record as it now stands, there is no evidence from which any reasonable trier of fact could conclude that the statements were truthful and that appellants would be entitled to judgment under Rule 56.

CONCLUSION

The judicial action privilege that attaches to otherwise defamatory statements made in the course of or prior to litigation is predicated upon policy considerations associated with the actual prosecution of claims by one party against another. The privilege never contemplated a letter of solicitation to a non-client since such solicitations were strictly prohibited.

In 1977, the U.S. Supreme Court held that lawyers' solicitations of new clients were subject to First Amendment protection as commercial free speech provided that, like any other commercial speech, they were truthful and not misleading. The Minnesota Supreme Court thereafter adopted that rule. It also emphasized the fact that such statements must be truthful and not misleading. This was also predicated upon the fact that a letter of solicitation serves the pecuniary interest of the lawyer.

Respondents sent a letter of solicitation in which defamatory statements were made about appellants. There is no evidence in the record

to support the truthfulness of these statements and, in fact, the evidence is overwhelming that the statements were false. Such false statements made in a letter of solicitation are not subject to the judicial action privilege because they do not constitute judicial action. They are nothing more than commercial free speech and, hence, subject to the requirement of being truthful and not misleading. In this case, the statements were not truthful and they were defamatory.

STATE OF MINNESOTA
IN COURT OF APPEALS

CB-95-462
Appeal from Judgment

J. PATRICK KITTLER and
LINDA ALT KITTLER,

Appellants/Plaintiffs,

v.

ECKBERG LAMMERS BRIGGS
WOLFF & VIERLING;
KEVIN K. SHOEBERG, ESQ.; and
JON PEDERSON, individually,

Respondents/Defendants.

APPELLANTS' REPLY BRIEF

Richard A. Williams, Jr. 117559
HVASS WEISMAN & KING CHARTERED
Suite 450, 100 So. 5th Street
Minneapolis, MN 55402
612-333-0201
and
Thomas Hatch 150939
ROBINS KAPLAN MILLER & CIRESI
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
612-349-8500
ATTORNEYS FOR APPELLANTS

Richard J. Thomas 137327
GERAGHTY O'LOUGHLIN & KENNEY
1400 Capital Centre
386 North Wabasha St.
St. Paul, MN 55102
612-291-1177
ATTORNEY FOR RESPONDENTS
ECKBERG LAMMERS BRIGGS WOLFF VIERLING
AND SHOEBERG

Jonathan Saffold, Jr.231526
LINDQUIST & VENNUM
4200 IDS Center
80 South Eighth St.
Minneapolis, MN 55402
6121-371-3211
ATTORNEYS FOR RESPONDENT PEDERSON

Matthis v. Kennedy, 67 N.W.2d at 417 (emphasis added).

It can hardly be said that it is "in the promotion of the public welfare" (see Matthis cite above) to permit lawyers to tell untruths when making a solicitation which is permitted solely by virtue of the fact that it is constitutionally protected and where the constitutional protection is predicated upon the truthfulness of the statement. Such a policy is contradictory, intellectually dishonest, and serves no useful public purpose. Whereas here there is solicitation of funds on behalf of the attorney to commence a lawsuit, none of the policy considerations apply that applied in Rubin. There, the actions of the attorney were to meet with witnesses who had actual knowledge of the underlying facts giving rise to the lawsuit. The latter is clearly "'in office' in the character of ... counsel - - in the performance of a public duty." See, Matthis, supra.

Writing to non-witnesses for purposes of money is not "in office." The only right the attorney has to do so is the right of commercial speech granted by the First Amendment to the U.S. Constitution. It is a right which is not unique to being an attorney--it is a right which inures to all citizens. Hence, the constitutionally protected right of an attorney to affirmatively contact potential clients does not arise out of the office of an attorney but, in fact, arises purely out of citizenship. There is no public purpose served to permit attorneys to tell untruths while exercising a constitutional right while holding all other citizens to a standard of truth when exercising the same constitutional prerogative. Not only is it not consistent with sound public policy, it is contradictory to the underlying rationale of Bates v. State Bar of Arizona, 433 U.S. 350 (1977), which established such rights for attorneys. Bates was predicated

upon commercial free speech being protected only the event that it was truthful speech.

This brings us to the final point to be made about Rubin, supra. Nowhere in Rubin did the California Supreme Court address the propriety of untruthful statements by an attorney in the course of a solicitation even if the solicitation itself is otherwise permitted. Reading in its entirety gives little comfort to defendants. The Rubin case, when placed in context and read as a whole, supports appellants' position. The balance of the cases cited by respondents in their brief, all deal with statements made by one litigant to another under circumstances which would clearly bring the statements within the scope of the judicial privilege. None of them involve statements made in the context of solicitation.

Respondent asserts that "whether or not a state bar association can permissibly [from a constitutional perspective] prohibit a certain form of advertisement and whether such 'advertisement' could be the basis of a civil action for defamation are completely different issues." See, P.20 of Brief of Respondent Shoeberg. In the abstract, that statement is true. However, it has nothing to do with appellants' argument. The judicial privilege precludes claims for defamation arising in the context of litigation. Those who formulated the privilege, however, never viewed solicitation as being a part of the office of the lawyer. Solicitation by lawyers was universally prohibited and considered not to be activity in which someone accorded the office of a lawyer should engage.

The Supreme Court said that it was, however, activity in which all citizens, regardless of whether they had "the office" of a lawyer or not could engage. Hence, lawyers could not be prohibited from advertising (soliciting) for clients because that was a right accorded to all citizens by the constitution. A fortiori, if commercial

free speech is a right which is accorded to all citizens regardless of occupation by the constitution, it is not a right which is unique to or accorded a lawyer as part of "the office."

Respondents now suggest the ludicrous result that lawyers, when exercising their constitutional right to free speech be given an element of free speech which no other member of the public exercising that constitutional right enjoys--namely, the right to be untruthful and to defame others while exercising that constitutional right. That is the claim which respondents are making in this case and that is the position which they seek to defend. That position, in appellants' view, is indefensible.

The fact that the constitutional right to commercial speech which permits lawyers to engage in the solicitation of clients is a constitutional right guaranteed by virtue of citizenship--not by virtue of being a lawyer--also disposes of respondents' implied argument that the appropriate remedy is limited to an ethical complaint against the lawyer. The ethical rules binding lawyers are a function of "the office" of a lawyer. In many cases, the ethical rules to which the lawyer is subject by virtue of "the office" impose upon the lawyer a higher standard of conduct than the public at large.

Where the lawyer in exercising a right which is not a part of "the office" but a part of the public domain of citizenship, the regulation of the lawyer's conduct in exercising that right should be on no different a basis than any other citizen. A lawyer should be subject to the same sanctions and the same consequences of making an untrue statement in the context of exercising a constitutional right,

should be held to the same consequences of any other citizen exercising that same right.[11]

> There is ample evidence in the record from which a trier of fact could conclude that the actions of respondents were malicious so as to deprive them of any qualified privilege that might attach to the lawyer's solicitation letter.

Appellants' contention is that no privilege of any kind attaches to a letter of solicitation sent by an attorney. However, assuming for the sake of argument (without so admitting) that there is a qualified privilege that attaches, there is ample evidence in the record to support a finding on the part of the trier of fact

---

[11]It is interesting to note again, as an aside, that respondents' position leads to the anomalous conclusion that a lawyer, in exercising a right guaranteed by citizenship rather than by being admitted to the practice of law, is permitted a lower standard of conduct than a private citizen exercising the same right of citizenship.

EXCERPTS FROM PETITIONERS' MEMORANDUM
IN OPPOSITION TO RENEWED MOTION FOR
SUMMARY JUDGEMENT
ARGUMENT

I. THE COURT MUST DENY DEFENDANTS' SUMMARY JUDGEMENT MOTION BECAUSE THERE ARE DISPUTED ISSUES OF MATERIAL FACT REGARDING WHETHER DEFENDANT SHOEBERG INTENDED IN GOOD FAITH TO FILE A LAWSUIT.

A. Whether Shoeberg Acted in Good Faith Is a Question of Fact That Must Be Resolved By The Jury.

Defendants' motion wrongly presupposes that Shoeberg's good faith can be decided by the Court, and strictly on Shoeberg's unilateral and self-serving assertions. In fact, the issue of good faith is a question of fact that only the jury may decide, and the jury will consider the totality of evidence in making its decision.

In its rulings on the privilege issues in this case, the Court has relied on the Restatement (2d) of Torts and its comments. The Court thus held that under Restatement Section 586, there is generally an absolute privilege for communications made by an attorney relative to a legal proceeding. However, relying on comment (e) to Section 586, the Court further held that where, as here, a lawsuit has not yet been commenced, the privilege attaching to an attorney's statements is conditioned on whether the attorney in good faith contemplated bringing an action. The Court therefore continued defendant's prior summary judgment motion to allow discovery to proceed on the questions whether Shoeberg in good faith contemplated bringing an action against the Kittlers. Judge Davis' Memo attached as Exh. C to Orenstein affd.

The Restatement clearly and unequivocally requires that the jury decide whether, as in this case, a privilege has

been abused so as to negate the application of the privilege:

Para. 619. Privileges

> (1) The court determines whether the occasion upon which the defendant published the defamatory matter gives rise to a privilege.
>
> (2) Subject to the control of the court whenever the issue arises, the jury determines whether the defendant abused a conditional privilege.

Restatement (2d) of Torts, para. 619 (1977), emphases added.[2a]

Minnesota courts have explicitly adopted the rule in Restatement para. 619 that the jury must decide any factual questions relating to the application of a privilege in a defamation action. See, e.g., Lewis v. Equitable Life Assurance Society of the United States, 389 N.W.2d 876, 890 (Minn. 1986) ("While the initial determination of whether a communication is privileged is a...

[2a] The comment to Section 619 makes clear that this rule applies to the privilege that Judge Davis found to be conditional under comment (e) to Section 586:

> b. The question whether the defendant acted for an improper purpose or in an improper manner is material if the publication is conditionally privileged under the rules stated in para. 585-598 A.... Those questions are for the jury to determine unless the facts are such that only one conclusion can reasonably be drawn.

Restatement (2d) of Torts, para. 619, comment (b) (1977), emphasis added.

III. JUDGE DAVIS HAS ALREADY REJECTED DEFENDANTS' PUBLIC POLICY ARGUMENTS.

Part III of Defendants' Memorandum, asserting a privilege on public policy grounds, is--literally--a verbatim repetition of Part V of their memorandum in support of their previous summary judgment motion. The defendants theorized then that the information Pederson gave to Shoeberg was protected from disclosure by the attorney/client privilege, thus somehow rendering Shoeberg unable to defend himself in this action.

However, Judge Davis squarely rejected that argument in a letter following up on his Memorandum Opinion. In that letter to counsel dated February 23, 1994, Judge Davis specifically held that "the underlying facts that gave rise to the February 26, 1993 letter [from Shoeberg to the former shareholders] are not protected by the attorney-client privilege and are thus discoverable." Exh. D attached to Orenstein Affd.

Interestingly, while defendants' verbatim recitation of their memorandum from last October avers that "Pederson has asserted the attorney/client privilege, preventing Shoeberg from disclosing any information he obtained from his client during confidential discussions," Def. mem. at p. 18, in fact Shoeberg's deposition was reconvened on May 3, 1994 and he answered such questions in accordance with Judge Davis' ruling.

Plaintiffs will therefore assume that under the law of the case there is no need to respond further to this part of defendants' motion. If necessary, plaintiffs would also refer the Court to the arguments and authority in plaintiffs' previous brief on this subject from last fall, attached as Exh. to the Orenstein affd.

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

J. Patrick Kittler and
Linda Alt Kittler,

Plaintiffs,

District Court File No.
MC 93-5920

v.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'SMOTION FOR SUMMARY JUDGMENT

Eckberg, Lammers, Briggs,
Wolff & Vierling;
Kevin K. Shoeberg, Esq.;
and Jon Pederson,
individually,

Defendants.

Plaintiffs J. Patrick Kittler and Linda Alt Kittler (the "Kittlers") submit the following Memorandum in Opposition to Defendants' Kevin K. Shoeberg ("Shoeberg") and Eckberg, Lammers, Briggs, Wolff and Vierling ("Eckberg, Lammers") Motion for Summary Judgment.

INTRODUCTION

This case and the instant motion concern whether a prospective plaintiff and his attorney are free to inform third parties of their intent to sue certain individuals for alleged specific acts of wrongdoing where there is no indication that the prospective plaintiff and his attorney have any serious, good faith basis for threatening the suit and where in fact they do not actually file the suit. Defendants Shoeberg and Eckberg, Lammers argue that they are free to engage in such conduct with impunity. The Kittlers, whose reputations have suffered in the business community as a result of the defendants' unsupported allegations, and who have been denied any opportunity to respond to or disprove those allegations, submit that neither the law of privilege nor Minnesota public policy protects such conduct.

DOCUMENTS COMPRISING THE RECORD (IN ADDITION TO THOSE CITED IN DEFENDANTS' MEMORANDUM)

A. Plaintiffs' Motion for a Continuance and to Compel Discovery and Supporting Memorandum, dated November 3, 1993.

B. Affidavit of Matthew L. Woods, dated November 3, 1993, and attached exhibits including excerpts from the deposition of Kevin K. Shoeberg.

ISSUES PRESENTED

1. **Whether the Record, in Its Current State, Contains the Factual Background Necessary for Evaluating Defendants' Asserted Defenses?**

2. **Whether an Attorney Can Claim an Absolute Judicial Privilege with Respect to Comments Made in a Solicitation Letter Asking Third Parties to Join in a Proposed Legal Action Where No Such Action Is Ever Filed?**

3. **Whether Defendants Can Claim a Qualified Privilege With Respect to Comments Made in a Solicitation Letter Asking Third Parties to Join in a Proposed Legal Action Where There is no Evidence that the Attorneys Had Reasonable Grounds to Believe that Any Basis for Such Legal Action Existed?**

4. **Whether a Letter Which States that the Author Has Been Retained, and is Prepared, to File a Legal Action Against a Person for Theft and Fraudulent Activity, and Which Invites Third Parties to Join in That Legal Action, Implies that that Person Has Actually Committed the Asserted Acts?**

5. **Whether Minnesota Public Policy Prohibits Actions by Third Parties Against Attorneys for Intentional Acts, the Prosecution of Which Does Not impinge Upon the Attorney-Client Relationship?**

FACTUAL BACKGROUND

On February 26, 1993, at the behest of his client and co-defendant Jon Pederson, defendant Shoeberg mailed a letter to the former shareholders of Ronde/First Merchants Corporation (the "February 26 letter"). See Exhibit A attached to the Affidavit of Richard J. Thomas,

filed along with defendants' Memorandum. That letter informed these third parties that Shoeberg and his firm had been retained by Pederson to file an action against both J. Patrick and Linda Alt Kittler for fraud, theft of corporate opportunity and breach of fiduciary duty. Id. The letter provided few factual details as to the basis for such a lawsuit. Nonetheless, it invited the third parties to join in this lawsuit and promised that a complaint would be served upon the Kittlers shortly after these third parties provided Shoeberg with the required retainer fee. Id. Significantly, despite the purported seriousness of the allegations, no lawsuit regarding these or any similar allegations has ever been filed against the Kittlers.

The Kittlers deny that they have engaged in any conduct of the type set forth in the February 26 letter. Amended Complaint, ¶ 6. This is particularly so for Mrs. Kittler who was never an officer of Ronde/First Merchants Corporation and thus had no duties of any sort to that corporation. Because the defendants never actually filed any lawsuit, however, the Kittlers never had the opportunity to formally dispute, respond to or disprove those allegations. As a result, rumors of wrongdoing continue to linger and the Kittler's reputations have been seriously damaged in the business community. See Amended Complaint, ¶ 6.

Accordingly, on April 23, 1993, the Kittlers commenced the present defamation action. The key issue in this case, for both the merits as well as defendants' claim of privilege, concerns what factual basis, if any, the defendants had for believing that both Mr. and Mrs. Kittler had committed the acts set forth in the February 26th letter. Since July of this year, the Kittlers have sought discovery on this crucial issue, but have been prevented from obtaining this information due to the defendants' assertions of attorney/client privilege. As a result, the record in this case is incomplete and lacking in this critical area.

ARGUMENT

a. THE RECORD CURRENTLY LACKS THE FACTUAL PREDICATES NECESSARY TO EVALUATE DEFENDANTS' ASSERTED DEFENSES.

On November 3, 1993, the Kittlers served and filed a motion pursuant to Rule 56.06 of the Minnesota Rules of Civil Procedure requesting that the Court continue consideration of defendants' summary judgment motion until such time as the Kittlers had a reasonable opportunity to conduct necessary discovery as to the factual predicates (if any) for defendants' asserted defenses. The Kittlers will not repeat the arguments and authorities discussed in their motion papers; rather, they hereby reference and incorporate those materials herein.

As explained in detail in those materials, the applicability of each of the defenses asserted in defendants' motion depends upon the existence of certain facts: for example, whether the defendants had any factual basis for making the allegations of theft and fraud that are contained in February 26 letter; and, the reasons why defendants never actually filed any action against the Kittlers regarding these allegations. These factual issues will determine whether a "judicial proceeding" even existed and whether the defendants were contemplating a suit against the Kittlers in good faith. As discussed in the Kittler's memorandum in support of a continuance, absent these facts, the defendants cannot avail themselves of the defenses set forth in the instant motion.

It is axiomatic that summary judgment should be denied where material facts are in dispute. E.g., Strauss v. Thorne, 490 N.W.2d 908, 911-12 (Minn. Ct. App. 1992) (reversing award of summary judgment in favor of defamation defendant on grounds that material issues of fact remained as to defendants' qualified immunity defense); McDevitt v. Tilson, 453 N.W.2d 53, 55-7 (Minn. Ct. App. 1990) (affirming denial of defamation defendants' motion for summary judgment on qualified immunity defense because material factual issues were in dispute as to applicability of defense).

Here, the Kittlers have been prevented from developing these material facts and providing countervailing affidavits due to assertions of attorney-client privilege and to the premature nature of defendants' motion. As a result, there simply is an insufficient record for the Court to evaluate the merit of the asserted defenses. Under these circumstances, there is a presumption in favor of deferring the summary judgment decision to permit sufficient time for discovery. Hasan v. McDonald's Corp., 377 N.W.2d 472, 475 (Minn. Ct. App. 1985) citing Rice v. Perl, 320 N.W.2d 407, 412 (Minn. 1982). Accordingly, a continuance pending completion of discovery is both appropriate and necessary for resolving defendants' motion.

CONTROLLING LAW AND PUBLIC POLICY DO NOT SUPPORT SUMMARY JUDGMENT ON THE GROUNDS ASSERTED BY DEFENDANTS.

Defendants' February 26 Letter Was Communicated Prior to Commencement of Any Judicial Proceeding and Is Thus Not Absolutely Privileged.

In Minnesota, statements made by attorneys to third parties prior to the commencement of a legal action are not absolutely privileged. See Nixon v. Dispatch Printing Co., 101 Minn. 309, 112 N.W. 258 (1907). In Nixon, the

plaintiff sued the St. Paul Dispatch for libel for publishing excerpts from a complaint in a divorce action. The Minnesota Supreme Court rejected the defendant's claim of absolute privilege, holding that a matter "not presented to the Court for its action is not a judicial proceeding within the rule." 101 Minn. at 312, 112 N.W. at 258-9; accord Timmis v. Bennett, 352 Mich. 355, 363-4, 89 N.W.2d 748, 752-53 (Mich. 1958) (holding that attorney's letter soliciting witnesses for proposed legal action was not privileged, stating that "the mere fact that defendant contemplated starting an action . . . does not bring the situation within the generally recognized rule"); Kenny v. Cleary, 47 A.D.2d 531. 532, 363 N.Y.S.2d 606, 609 (N.Y. App. Div. 1975) ("the first through fifth causes of action relate to alleged defamatory statements made before the commencement of that judicial proceeding and do not qualify for absolute privilege").[13] Accordingly, since the defendants have not yet filed any claim against the Kittlers, they cannot avail themselves of the absolute privilege.

The defendants argue that the Nixon decision was effectively overruled in Matthis v. Kennedy, 243 Minn. 219, 67 N.W.2d 413 (Minn. 1954). A close reading of Matthis, however, does not support this conclusion. The opinion in Matthis does not even mention Nixon. Equally important, Matthis involved a defamatory statement made during a hearing before a judge in a proceeding actually filed in probate court. 67 N.W.2d at 415-16. Contrary to defendants' argument, the Matthis court did not make any holding with respect to statements made prior to the initiation of a judicial proceeding of the type addressed in Nixon. Accordingly, there is simply no basis to argue that Nixon has been overruled.

The other cases cited by defendants in support of their argument are equally unpersuasive. Freier v. Ind. School Dist. No. 197, 356 N.W.2d 724 (Minn. Ct. App. 1984) involved statements made during and as part of a

quasi-judicial hearing. Pinto v. Internationale Set, Inc., 650 F. Supp. 306 (D. Minn. 1986) involved a letter threatening litigation which was sent to the proposed defendants, not to third parties. Moreover, the letter actually resulted in the filing of a lawsuit. Thus, in both Freier and Pinto, the court was faced with situations where the alleged defamed party had a reasonable opportunity to respond to the charges through judicial or quasi-judicial proceedings.[12] Here, because defendants have directed the letter to third parties and have not actually filed any action, the Kittlers have had no opportunity to respond to these charges and thus no judicial proceeding exists on which to base a claim of privilege.

---

[12]In fact, all of the remaining cases cited by the defendants involve communications which took place in the context of an actually filed proceeding or which were made to the proposed defendants. E.g. Jones v. RCA Music Service, 530 F. Supp. 767, 768 (E.D. Pa. 1982) (alleged defamatory letter sent to proposed defendant); Club Valencia Homeowners' Association v. Valencia Association, 712 P.2d 1024, 1025-26 (Colo. App. 1985) (alleged defamatory letter concerned case actually filed); Sriberg v. Raymond, 345 N.E.2d 882, 883 (Mass. 1976) (alleged defamatory letter sent to proposed defendants and suit actually filed); Russell v. Clark, 620 S.W.2d 865, 866-868 (Tex. App. 1981) (alleged defamatory letter sent to proposed defendant and discussed cases already pending). The case of Rubin v. Green, 17 Cal. Rptr. 2d 828, 847 P.2d 1044 (Cal. 1993) is unique in that it did not even involve a defamation claim, but rather a wrongful solicitation claim based on a particular California statute. 17 Cal. Rptr. 2d at 829-831, 833, 847 P.2d at 1046-47, 1049 ("the gravamen of plaintiff's complaint is not that the claims are groundless but that the methods employed by the law firm [were] criminal").

Nixon clearly provides the better rule of law in situations like the present where no action has ever been filed against the alleged wrongdoer. Under defendants' proposed analysis, an attorney or party could engage in defamation with impunity merely by threatening, but never actually filing, a legal action. Such parties could thus avail themselves of the benefits of the judicial privilege without ever facing the risks and consequences of actual litigation (e.g., Rule 11, counterclaims, costs of litigation, etc.). Under this scenario, defamed individuals would have no recourse for formally clearing their reputation and would have to chase down rumors on an ad hoc basis. The doctrine of absolute immunity with respect to judicial proceedings was never intended to yield such a result.

Even if the Court chooses to disregard Nixon, summary judgment is still unwarranted because factual issues remain regarding whether a suit against the Kittlers was "contemplated in good faith and under serious consideration" and amounted to more than a "mere possibility." See Restatement (Second) of Torts § 586 comment e (1977); Plaintiffs' Memorandum in Support of Motion for a Continuance and in Support of Motion to Compel, pp. 7-8. If there was no reasonable factual basis for the allegations in the February 26 letter, then, even under defendants' cited authority, no privilege would exist. Id.; see also Herzog v. "A" Co., Inc., 188 Cal. Rptr. 155, 157-8 (Cal. Ct. App. 1982) (rejecting claim of absolute privilege with respect to letter threatening lawsuit where there was no underlying basis for threatened claims).

The defendants argue that the February 26 letter "clearly indicates" that a lawsuit against the Kittlers was under serious consideration. Nevertheless, the record is absolutely barren of any indication that there was a good-faith basis for this proposed lawsuit. The fact that the lawsuit was never actually filed certainly suggests a lack of

basis for the action. In addition, the fact that Mrs. Kittler was not an officer of Ronde/First Merchants Corporation certainly calls into question the basis for any proposed action against her. If in fact the defendants had a good faith basis for threatening the lawsuit, they refused to share that information during their deposition, despite repeated questioning on this subject. See Plaintiffs' Memorandum in Support of Motion for a Continuance and in Support of Motion to Compel, pp. 11, 13.

In sum, the evidence currently available suggests that there was no basis for the allegations in the February 26 letter. The defendants have offered nothing to counter this conclusion. Based upon this record, summary judgment on the grounds of absolute immunity is simply not justified.

Defendants Have Not Demonstrated that They Had Reasonable or Probable Cause for the Accusations Contained in the February 26 Letter.

In order to avail oneself of a qualified privilege, a party must not only have a proper occasion to publish the communication, but also must do so "upon reasonable or probable cause." See Stuempges v. Parke, Davis Co., 297 N.W.2d 252, 256-7 (Minn. 1980); Brooks v. Doherty, Rumble & Butler, 481 N.W.2d 120, 125 (Minn. Ct. App. 1992). Minnesota courts have interpreted this requirement to mean that the defendant actually investigate the situation "to determine the accuracy of the statements . . . ." Brooks, 481 N.W.2d at 125 citing Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 380 (Minn. 1990). Where a defendant has conducted no such investigation, but instead relies on accusations or hearsay, that defendant lacks reasonable grounds for making the defamatory statement and cannot avail himself of the qualified privilege. Wirig, 461 N.W.2d at 380-81 (reinstating jury award on

defamation claim and rejecting qualified privileged defense due to defendant's lack of investigation).

The defendants have failed to provide the Court with any evidence indicating that they had reasonable grounds for believing that both Patrick and Linda Kittler had committed theft and fraud. The defendants' memorandum conclusorily asserts that such "probable cause" existed, but cites to nothing in the record to support this assertion. The defendants' refusal to answer questions regarding the factual basis for the allegations in the February 26 letter makes it impossible to determine whether they had reasonable grounds for their conclusions.[13] What is clear, however, is that defendant Shoeberg relied solely upon his clients for his conclusion that the Kittlers had committed fraud and theft. Mr. Shoeberg admitted this point several times in his deposition:

> Q: Have you information, as you sit here today, which you possessed as of February 26, 1993, to indicate that Pat Kittler is a thief of corporate property?
>
> Mr. Thomas[14]: Wait. Are you asking that independent of what he learned from this clients?

---

[13]This refusal also prevents the Kittlers from exploring whether the defendants acted with malice so as to defeat the qualified privilege, thus providing additional justification for denying, or at least continuing, defendants' summary judgment motion.

[14]Richard Thomas is counsel for defendant Kevin Shoeberg.

Mr. Tansey[15]: I'm asking him if he has any information which leads him to believe that Pat Kittler is a thief of corporate property.

Mr. Thomas: I'm going to instruct you not to answer that question insofar as it involves any information you received from your clients and I'm going to object to the argumentative nature of your question but I'm not going to instruct him not to answer on that visit. If you have information from sources other than your clients to support any allegations that Mr. Kittler appropriated corporate assets, belonging to someone or some entity other than himself, you can answer that question:

A: The information I was provided was provided to me by my clients.

Q: Can you tell me what corporate property Mr. Kittler and Mrs. Kittler supposedly took?

Mr. Thomas: Don't answer that question.

Mr. Tansey: What's the basis for that?

Mr. Thomas: Attorney client privilege.

---

[15]Robert Tansey is counsel for plaintiffs.

Q: Can you tell me what fraud Mrs. Kittler or Mr. Kittler engaged in?

Mr. Thomas: Don't answer that question on the basis of attorney client privilege.

Q: Can you tell me what misrepresentation Mrs. Kittler made?

Mr. Thomas: Same instruction.

Q: Can you tell me what company Mrs. Kittler was an officer of in which she breached her fiduciary duty?

Mr. Thomas: The same instruction unless you have independent sources of information beyond your claim.

A: I have no other independent sources. Deposition of Kevin Shoeberg, pp. 28-30 (emphasis added).[16]

Clearly, the only evidence available in the record suggests that the defendants took no steps to independently verify the accusations made in the February 26 letter. Under these circumstances, the defendants have not made out a prima facie case of qualified privilege.[17]

---

[16]These excerpts from the Deposition of Kevin Shoeberg are attached to the Affidavit of Matthew L. Woods filed along with the Kittlers' motion for a continuance and to compel.

[17]The defendants' citation to Kenny v. Cleary, 47 A.D.2d 531, 363 N.Y.S.2d 606 (N.Y. App. Div. 1975) is not only inapposite but also actually supports the Kittlers'

The February 26 Letter Implies that the Kittlers Committed Specific Acts of Theft and Fraud.

The defendants argue that the February 26 letter contains only opinion and is thus unactionable. As explained in the Kittlers' memorandum in support of their motion for a continuance, however, recent decisions from the United States Supreme Court and Minnesota courts have rejected this artificial dichotomy between fact and opinion and have held that opinions which imply the existence of objective facts are indeed actionable. See Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S. Ct. 2695, 2705-07 (1990); Weissman v. Sri Lanka Currie House, Inc., 469 N.W.2d 471, 473 (Minn. Ct. App. 1991). Thus, whether the February 26 letter is characterized as fact or opinion is largely irrelevant.

Regardless of how it is characterized, the February 26 letter clearly accuses both Mr. and Mrs. Kittler of committing theft and fraud. The letter specifically solicits third parties to join co-defendant Jon Pederson in a legal action to be filed against the Kittlers. The defendants would have this Court believe that this letter was intended only for informational purposes, notwithstanding the enclosed retention letter, the request for a $10,000 retainer, and the closing promise that a complaint would be

---

position. First, the court in Kenny reversed the dismissal of the plaintiffs' defamation claim, ruling that the plaintiffs were entitled to a jury regarding the issue of malice. 363 N.Y.S.2d at 609. Second, the Kenny court did not discuss whether the defendants had probable cause for making the alleged defamatory statements; this was not an issue because, unlike here, the defendants had actually filed a lawsuit. Third, as discussed in the previous section, the court in Kenny held that "alleged defamatory statements made before the commencement of the judicial proceeding do not qualify for absolute privilege." Id.

served upon the Kittlers when the defendants received their money. This interpretation stretches credulity. Rather, this earnest solicitation unequivocally implies that the Kittlers committed these wrongful acts; otherwise, there would be no basis for filing the lawsuit. Moreover, the letter conditions the filing of the lawsuit upon receipt of the retainer, not upon some hypothetical subsequent investigation on the part of the defendants. In sum, by mailing the February 26 letter, the defendants communicated to third parties that the Kittlers had engaged in specific wrongful acts egregious enough to justify legal action.[18] Such communications, if proven false, are clearly defamatory.

Minnesota's Public Policy Does Not Bar the Kittlers' Cause of Action Against Defendants Shoeberg and Eckberg, Lammers.

The defendants argue that because they would have to disclose attorney-client communications in order to defend this action, it is barred by public policy. This argument is fatally flawed for two reasons. First, although the argument is based upon the holdings of two Minnesota cases, each case limits its holding to actions based upon negligence. Both cases emphasized that where an attorney commits an intentional tort, the rule does not apply. Melrose Floor Co., Inc. v. Lechner, 435 N.W.2d 90, 91

---

[18]This situation is completely unlike the case of Capan v. Daugherty, 402 N.W.2d 561 (Minn. Ct. App. 1987) relied upon by defendants. The Capan case involved general, amorphous statements about a woman's psychological status made by her former supervisor. These statements were neither objectively verifiable nor did they involve accusations of wrongdoing or moral turpitude. The defamation against the Kittlers, however, consists of accusations of specific, objectively verifiable acts of wrongful, dishonest conduct.

(Minn. Ct. App. 1989); Eustis v. David Agency, Inc., 417 N.W.2d 295, 298 (Minn. Ct. App. 1987). The defamation cause of action at issue, however, is in intentional tort. Thus, it expressly falls outside the rationale of these decisions.

Second, contrary to defendants' arguments, they need not necessarily disclose attorney-client communications to defend this lawsuit. In order to defend against this action, the defendants have to prove that the allegations in the February 26 letter are true; that is, that there is some factual basis or probable cause for believing that a cause of action existed against the Kittlers. Such factual basis, however, is not protected from disclosure by the attorney client privilege, even if co-defendant Pederson communicated these facts to his attorneys.

It is fundamental that the attorney-client privilege does not protect disclosure of the underlying facts communicated by a client to his attorney. Upjohn Co. v. United States, 449 U.S. 383, 395-6, 101 S. Ct. 677, 685-6 (1981) (witness may not refuse to disclose relevant facts within his knowledge merely because such facts were incorporated into an attorney-client communication); Sedco Intern. S.A. v. Cory, 683 F.2d 1201, 1205 (8th Cir. 1982) ("The privilege does not protect facts communicated to an attorney"); Protective Nat. Ins. Co. v. Commonwealth Ins. Co., 137 F.R.D. 267, 278-9 (D. Neb. 1989) (same); Aerojet-General Corp. v. Transport Indemnity Ins., 22 Cal. Rptr 2d 862, 866 (Cal. Ct. App. 1993) (same). Thus, the defendants will not violate any attorney-client privilege merely by explaining what factual basis existed (if any) for the theft and fraud claims asserted against the

Kittlers.[19] Accordingly, there is no public policy justification for preventing this case from going forward.

CONCLUSION

There is a fine but vitally important line between encouraging access to the judicial process and discouraging individuals from disseminating to third parties baseless or unsupported claims of alleged wrongdoing. Based upon the sparse record to date, defendants' conduct appears to fall closer to the latter category rather than the former, thus falling outside any privilege defense. For these and all the foregoing reasons, plaintiffs respectfully request that the defendants' motion for summary judgement should in all respects be denied and that defendants be compelled to respond to all discovery regarding the factual basis for the February 26 letter.

Dated this _8th___ day of November, 1993

---

[19]Even if the privilege extended to these underlying facts, the defendants have waived it by sharing this information with third parties. See Plaintiff's Memorandum In Support Of Motion For Continuance And To Compel Discovery, pp. 11-15.

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

J. Patrick Kittler and
Linda Alt Kittler,

Plaintiff,

v.

Eckberg, Lammers, Briggs,
Wolff & Vierling;
Kevin K. Shoeberg, Esq.;
and Jon Pederson, individually,

Defendants.

Court File
No. MC 93-5920

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR A CONTINUANCE PURSUANT TO RULE 56.06 AND IN SUPPORT OF MOTION TO COMPEL

Excerpts:

. . .P.8-9.

It is fundamental to the law of defamation that whether a defendant acted in malice is a factual issue which should be left for the jury. See Lewis v. Equitable Life Assur. Soc., 389 N.W. 2d 876, 890 (Minn. 1986); Moore v. Dispatch Printing Co., 87 Minn. 450, 453, 92 N.W. 396, 397 (1902).

. . .P.12.

A. The Defendants Have Waived Any Attorney-Client Privilege Regarding The February 26 Letter.

It is a fundamental principle of law that an attorney who shares privileged communications with a third party effectively waives any attorney-client privilege. E.g., State

v. Thompson, 306 N.W. 2d 841, 843 (Minn. 1981); Sprader v. Mueller, 269 Minn. 25, 31-2, 130 N.W. 2d 147, 151-2 (1964).

It is uncontroverted that defendant Shoeberg mailed the February 26 letter to approximately 56 former shareholders of Ronde/First Merchants Corporation. See Shoeberg Depo., p. 40, 23-25. Mr. Shoeberg admitted that the purpose of this letter was to solicit these former shareholders as clients; i.e. these individuals were not clients at the time that the letter was sent. See Shoeberg Depo., p.41, 11. 1-3. . . .

The February 26 letter clearly reveals the substance of attorney-client communications to these third parties. The letter specifically references communications from Jon Pederson and "several of the former shareholders" regarding commencement of an action against the Kittlers and the Minnesota Trade Trust . . .

P.13.

Mr. Shoeberg admitted several times during his deposition that his knowledge regarding these issues was provided to him solely by his clients. E.g., Shoeberg Depo. p. 25, 11. 14-23; p. 28, 1. 24 through p. 30, 1. 16. There can be no more textbook case of waiver of the privilege.

In addition, there are significant public policy reasons for vitiating or limiting the attorney-client privilege in this context. In answering the Complaint, the defendants have affirmatively alleged that the statements in the February 26 letter are true. Joint and Separate Answer, para. 6; Shoeberg Depo., p. 45, 1. 23 through p. 49, 1.25. . . .

P.14-15.

It is troubling that the defendants are relying on a defense that the statements made in the February 26 letter are true while at the same time trying to prevent the plaintiffs

from examining the basis for that defense. The defendants should not be allowed to use the attorney-client privilege as both a sword and a shield. If they intend to rely upon the truth of the February 26 letter as a defense to this action, then basic notions of fair play and substantial justice require that the plaintiffs be allowed to explore the factual underpinnings for that defense. Otherwise, the plaintiffs will be effectively denied the opportunity to prove their claim. See generally, Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wa. 1975) (holding that civil rights defendants had waived attorney-client privilege by asserting affirmative defense of immunity which was based on legal advice from counsel);[7] Drybranch Kaolin Co. v. Doe, 622 A.2d 1320, 1323-24 (N.J. App. Div. 1993) (disregarding attorney-client privilege associated with alleged defamatory letter on the ground that plaintiff needed the privileged information in order to prove its claim).

[7]The court in Hearn observed:

> Defendants invoked the privilege in furtherance of an affirmative defense they asserted for their own benefit; through this affirmative act they placed the protected information at issue, for the legal advice they received is germane to the qualified immunity defense they raise; and one result of asserting the privilege has been to deprive the plaintiff of information necessary to defend against defendants' affirmative defense.

68 F.R.D. at 581.